DOCUMENT RESUME

ED 236 750 CS 504 459

AUTHOR	Matlon, Ronald J., Ed.; Crawford, Richard J., Ed.
TITLE	Communication Strategies in the Practice of Lawyering. Proceedings of the 1983 Summer Conference on Communication Strategies in the Practice of Lawyering (Oracle, AZ, June 24-27, 1983).
INSTITUTION	Speech Communication Association, Annandale, Va.
PUB DATE	83
NOTE	489p .; Conference was sponsored by the Speech Communication Association, American Forensic Association, Western Forensic Association and the University of Arizona Department of Speech Communication.
AVAILABLE FROM	Speech Communication Association, 5105 Backlick Rd., Suite F, Annandale, VA 22003 ($15.00).
PUB TYPE	Viewpoints (120) -- Guides - Non-Classroom Use (055)
EDRS PRICE	MF03 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Behavioral Sciences; Communication Research; *Communication Skills; Interdisciplinary Approach; Interviews; Language Skills; *Language Usage; *Lawyers; *Persuasive Discourse; Research Methodology; Research Needs; Theories
IDENTIFIERS	*Communication Strategies; Cross Examination; Juries

ABSTRACT

Drawn from a conference intended as a step toward reuniting the disciplines of behavioral sciences and law, the items in this compilation were prepared by practitioners and educators in the areas of law, communication, social psychology, and sociology. The items are arranged in five sections according to these topics: interviewing and counseling, negotiating and bargaining, jury selection and jury behavior, direct and cross examination, and opening statements and closing arguments. Each section contains (1) a review of pertinent research, (2) discussions of legal strategies and research needs from the perspectives of the different disciplines, and (3) responses to the discussions. The compilation also contains the text of the keynote address presented by lawyer Percy Foreman and the concluding remarks offered by Gerald R. Miller, professor of communication. (FL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED236750

COMMUNICATION STRATEGIES IN THE PRACTICE OF LAWYERING

1983 Conference Proceedings
University of Arizona

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

EDITORS

Ronald J. Matlon
Richard J. Crawford

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

SCA

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

CS 504459

COMMUNICATION STRATEGIES IN THE PRACTICE OF LAWYERING

Proceedings of the 1983 Summer Conference on Communication
Strategies in the Practice of Lawyering

Sponsored by the

Speech Communication Association
American Forensic Association
Western Forensic Association
and
The University of Arizona
Department of Speech Communication

Hosted by

The University of Arizona
June 24-27, 1983
Oracle Conference Center
Oracle, Arizona

EDITORS

Ronald J. Matlon
University of Arizona

Richard J. Crawford
University of Northern Colorado

Publisher of Record for Use in Uniform Citations: Speech Communication
Association, 5105 Backlick Road, #E, Annandale, Virginia 22003
Date of Publication: 1983

PARTICIPANTS

Conference on Communication Strategies in the Practice of Lawyering

MICHAEL L. ALTMAN
College of Law
Arizona State University

WILLIAM L. BENOIT
Department of Speech Communication
Bowling Green State University

RAYMOND W. BUCHANAN
Department of Communication
University of Central Florida

HARVEY BURDICK
Department of Psychology
Oakland University

TERRENCE BURKE
Office of the President
University of Arizona

BILLY CATCHINGS
Department of Speech Communication
University of Arizona

ERWIN CHEMERINSKY (2)
College of Law
DePaul University

SAM COHEN
Department of Speech Communication
University of Arizona

E. NEAL CLAUSSEN
Department of Speech Communication
Bradley University

BARBARA L. CLINTON
Department of Speech Communication
University of Washington

SAM COX
Department of Speech Communication
University of Arizona

ERIC CRANE
Department of Communication Studies
Northwestern University

RICHARD J. CRAWFORD (1,2)
Department of Communication
University of Northern Colorado

LEE T. DAVIS
Attorney
Albuquerque, New Mexico

PHILIP B. DAVIS
Attorney
Aubuquerque, New Mexico

WILLIAM DERR
Department of Speech Communication
University of Arizona

VIVIAN I. DICKS
Department of Speech Communication
University of Detroit

JANET G. ELSEA
Communication Skills, Inc.
Washington, DC

JACK ETHERIDGE
School of Law
Emory University

HENRY F. EWBANK
Department of Speech Communication
University of Arizona

ROBERT FELDHAKE
Attorney
Los Angeles, California

PERCY FOREMAN
Attorney
Houston, Texas

JOHN S. FRANCE
Attorney
Temperance, Michigan

MARCIA GRAND
Tucson, Arizona

KEITH H. GRIFFIN
Department of Speech Communication
Wingate College

JANE GOODMAN
Department of Psychology
University of Washington

ROGER HAYDOCK
William Mitchell College of Law
St. Paul, Minnesota

KENNEY HEGLAND
College of Law
University of Arizona

DAVID B. HINGSTMAN
Department of Communication Studies
Baylor University

JUDITH HARTWELL
Department of Speech
University of New Hampshire

STEVEN B. HUNT
Department of Communication
Lewis and Clark College

DONALD J. IRVING
College of Fine Arts
University of Arizona

NORBERT S. JACKER
College of Law
DePaul University

DARLA JANSSEN
College of Law
University of Arizona

LUCY A. KEELE
Department of Speech Communication
California State University-Fullerton

JOAN B. KESSLER (2)
Department of Speech Communication
California State University-Northridge

WIL A. LINKUGEL
Department of Communication
University of Kansas

ELIZABETH LOFTUS
Department of Psychology
University of Washington

CLARICE LOWE
School of Communication
Texas Southern University

NANCY GOSSAGE MCDERMID (2)
College of Humanities
San Francisco State University

BARBARA MACDONALD
Department of Speech Communication
University of Arizona

RUTH M. MCGAFFEY
Department of Speech Communication
University of Wisconsin-Milwaukee

FRANCIS E. MCGOVERN
College of Law
Boston University

RONALD J. MATLON (1,2,3)
Department of Speech Communication
University of Arizona

THOMAS A. MAUET
College of Law
University of Arizona

GERALD R. MILLER
Department of Communication
Michigan State University

CARL MOORE
School of Speech
Kent State University

ROBERT E. NOFSINGER
Department of Communication
Washington State University

PAUL OLSON
Department of Speech Communication
University of Arizona

SEAN PATRICK O'ROURKE
Department of Speech Communication
University of Oregon

DOLORES M. PARKS
Community College of Philadelphia
Philadelphia, PA

DON PETERS
College of Law
University of Florida

RICHARD RIEKE (2)
Department of Speech
University of Utah

JAN SCHUETZ
Department of Speech
University of New Mexico

RITA JAMES SIMON
  School of Justice
  American University

DAVID H. SMITH
  College of Medicine
  University of South Florida

STEVEN SMITH
  Department of Speech
  University of Arkansas

JANET SPARROW
  Department of Speech Communication
  University of Denver

V. HALE STARR
  Starr and Associates
  Des Moines, Iowa

DAVID TAUGHER
  Reddy Communications, Inc.
  Greenwich, Connecticut

K. PHILLIP TAYLOR (2)
  Department of Communication
  University of Central Florida

IRVING TORGOFF
  Department of Psychology
  Oakland University

LEROY J. TORNQUIST
  College of Law
  Willamette University

PAMELA TREADWELL
  School of Law
  University of Arizona

JOYCE E. TSONGAS
  Trial Consultant
  Portland, Oregon

WALTER ULRICH
  Department of Speech Communication
  Vanderbilt University

MICHEAL VICKERY
  Department of Speech Communication
  University of Arizona

DAVID WAGNER
  Department of Speech Communication
  California State University-Sacramento

VINCENT WALDRON
  Department of Speech Communication
  University of Arizona

CHERYN HEINEN WALL
  Scottsdale, Arizona

DONALD A. WALL
  Attorney
  Scottsdale, Arizona

JAMES F. WEAVER (2)
  Department of Speech Communication
  Iowa State University

DAVID WILLIAMS
  Department of Speech Communication
  University of Arizona

JOHN W. WRIGHT II
  Department of Broadcasting
  University of Florida

WARREN E. WRIGHT
  Department of Rhetoric and Oratory
  Hamilton College

GORDON I. ZIMMERMAN
  Department of Speech Communication
  University of Nevada-Reno

(1) Conference Directors

(2) Conference Steering Committee Members

(3) Conference Host

TABLE OF CONTENTS

INTRODUCTORY REMARKS

Preface 2
Ronald J. Matlon
Richard J. Crawford

Keynote Address 4
Percy Foreman

LEGAL INTERVIEWING AND COUNSELING

Review of Research on Legal Interviewing and Counseling 12
James F. Weaver

From the Legal Profession: Legal Strategies and Research Needs in Interviewing and Counseling 34
Kenney Hegland

Legal Interviewing and Counseling: Communication As Process 54
David B. Hingstman

Legal Interviewing and Counseling: A Response to Hegland and Hingstman 80
Vivian I. Dicks

Legal Interviewing and Counseling: Creating Shared Social Realities 88
Robert E. Nofsinger

Responses to Legal Interviewing and Counseling Program 105

LEGAL NEGOTIATING AND BARGAINING

Review of Research on Negotiating and Bargaining: Problems With the Economic Model as a Basis for Theory and Research on Negotiation 112
David H. Smith

From the Legal Profession: Legal Strategies and Research Needs in Negotiating and Bargaining 126
Norbert S. Jacker

From the Communication Profession: Communication Strategies and Research Needs in Legal Negotiating and Bargaining 149
Sean Patrick O'Rourke
Janet Sparrow

Negotiation, Mediation, and Alternative Dispute Resolution 176
Carl M. Moore
Cheryn Wall

Responses to Legal Negotiating and Bargaining Program 200

JURY SELECTION AND JURY BEHAVIOR

Review of Research on Jury Selection and Jury Behavior 206
K. Phillip Taylor
John W. Wright

From the Legal Profession: Legal Strategies and Research Needs in the Selection of Juries 224
Robert J. Feldhake

Communication Strategies and Research Needs in Selecting Juries 250
Ruth McGaffey

Comments on Jury Selection and Jury Behavior Papers 274
Rita J. Simon

Response Paper: Jury Selection and Jury Behavior 278
Nancy Gossage McDermid

Responses to Jury Selection and Jury Behavior Program 286

DIRECT AND CROSS-EXAMINATION

Examining Witnesses -- Good Advice and Bad 292
Elizabeth F. Loftus
Jane Goodman
Chris Nagatkin

From the Legal Profession: Legal Strategies and Research Needs in Direct and Cross-Examination 318
Francis E. McGovern
James H. Davis

Communication Strategies and Research Needs in Direct and Cross-Examination 343
Gordon I. Zimmerman

A Response to Legal Strategies, Communication Strategies and Research Needs in Direct and Cross-Examination 353
Leroy J. Tornquist

Staging the Courtroom Drama: An Analysis of Direct and Cross-Examination 367
Janice Schuetz

Responses to Direct and Cross-Examination Program 380

OPENING STATEMENTS AND CLOSING ARGUMENTS

Review of Research on Opening Statements and Closing Arguments 384
William L. Benoit
John S. France

Participatory Persuasion: Strategies and Research Needs in Opening Statements and Closing Arguments 401
Don Peters

From the Communication Profession: Communication Strategies and Research Needs on Opening Statements and Closing Arguments 424
V. Hale Starr

Opening Statements and Closing Arguments: A Response from the Communication Perspective 449
Raymond W. Buchanan

Responses to Opening Statements and Closing Arguments Program 461

CONCLUDING REMARKS

On the Meeting of Epistemological and Methodological Minds: Some Final Thoughts on the Conference 466
Gerald R. Miller

About the Authors 478

Ronald J. Matlon, Conference Co-Director and Host	Gerald R. Miller, Conference Speaker	Percy Foreman, Conference Keynoter	Richard J. Crawford, Conference Co-Director

INTRODUCTORY REMARKS

Conference Directors

Ronald J. Matlon
Department of Speech Communication
University of Arizona

Richard J. Crawford
Department of Communication
University of Northern Colorado

PREFACE

This conference is one whose time has come, and we hope it will represent a significant step toward the reuniting of those two historic disciplines--the behavioral sciences and the law. Time and happenstance created a deep separation between the two, but it should be remembered that during Classical Times lawyers in many respects were the behavioral scientists, particularly in the area of the study of human communication. Indeed, the best works on persuasion and communication from Ancient Rome come to us from the pen of a well-known lawyer by the name of Cicero. Surely he would applaud the reunion effort of this conference.

But despite the long historical separation of these two disciplines, recent years have brought an increased awareness and some interesting interactions between the lawyer and the behavioral scientist. Scholars from social psychology, sociology, communication, etc., have made meaningful strides in advancing our understanding of the jury trial and the legal process. Further, academic professionals can frequently be found as lecturers and seminar directors in training sessions for trial lawyers. The behavioral scientist as trial consultant is also fast becoming a fixture in American jurisprudence.

Such were some of the thoughts we were having toward the end of 1981 as the ideas for this conference began to take shape. During the winter of 1982 we decided on the conference title of "Communication Strategies in the Practice of Lawyering" and selected the following five topic areas: (1) interviewing and counseling; (2) negotiating and bargaining; (3) jury selection and jury behavior; (4) direct and cross examination; and (5) opening statements and closing arguments.

We next selected a steering committee composed primarily of individuals who would become the chairpersons for each of the five topic areas mentioned above. These five were to assume the major responsibility for securing the conference participants who would present papers, respond to papers, etc. In the late spring of 1982, we arranged a profitable conference call involving the entire steering committee. From that call emerged a pool of names of what we collectively thought were the most appropriate scholars and educators from the behavioral sciences and law who might participate in our conference. The collection of papers in this volume is testimony to the excellent work of the steering committee and especially the five conference chairpersons.

Our conference goals at that time may have seemed somewhat ambitious, but we think the reader of these proceedings may find those goals neither too ambitious nor unrealized. These excellent contributed papers, coupled with the interactions among our panelists during the conference, have combined to make us feel that the goals listed below are appropriate ones.

1. To heighten the awareness of the interrelationship between the behavioral sciences and the study and practice of law.

2. To illustrate the potential mutual advantage of an increased professional association between the law and the behavioral sciences.

3. To begin a search for a more common and consistent language for improving communication between the legal profession and the behavioral sciences.

4. To enhance the level of our understanding of the state of current research in the five conference topic areas.

5. To discover arenas of research deficiencies for the purpose of encouraging specific future research.

6. To provide a better understanding of the role played by the communication strategies in all phases of the legal process.

Finally, we offer a special acknowledgment and our gratitude to William Work and the Speech Communication Association for making possible the publication of these important proceedings. We also wish to thank the American Forensic Association and the Western Forensic Association for their financial and moral support of this conference.

Perhaps most importantly, we wish to thank the University of Arizona Foundation, Office of Research, College of Fine Arts, Department of Speech Communication including its staff and graduate students, for their extraordinary support without which there could have been no conference.

RJC and RJM
Editors

KEYNOTE ADDRESS*

Percy Foremen

I had planned to commence my address by saying, "beautiful ladies, learned lawyers, distinguished professors, and fellow students of oral English" and then, "that concludes the prepared portion of my address."

If Thomas Gray was living today I'm sure he would be a member of, or at least, sympathetic to the purpose of this organization. He wrote the cornerstone in his:

> Full many a gem of purest ray serene,
> The dark unfathomed caves of ocean bear,
> Full many a flower is born to blush unseen,
> And waste its sweetness on the desert air.

The difference is communication.

I did get to look over your conference topics this afternoon and since I am billed as a keynote speaker I think I should try to cover whatever the program is going to be. I have participated in several hundred, and maybe more, seminars and bar meetings all over the United States with the same subjects you have on your program, so it shouldn't be difficult for me to say, at least, something intelligent about each of your program subjects. With your permission I'll just do that.

But before I do that, I want to make a few background points. For example, Racehorse Haynes, a good friend of mine, gives me credit for the fact that today Houston has a good bar. By the way, Racehorse also says that I taught him all he knows, but I didn't teach him all I know. In any case, when I came into the criminal law practice I was warned that the public generally takes a dim view of a lawyer practicing criminal law. They think you are defending crime. They don't know that you are simply defending the rights of an individual to a trial according to law. Actually, a defense lawyer in criminal cases is a law enforcement agent, just the same as the district attorney and I established that fact in Texas. I have as much right in the courtroom as the prosecuting attorney. The defense lawyer enforces the law against the state, the constabulary, the arresting office, the assistant district attorney, preventing their leading questions and other invasions of the rights of an individual.

There are 43 rights guaranteed an American citizen by the Constitution in the Bill of Rights and every one of them is a handicap to law enforcement. They were put there for that specific purpose by our Founding Fathers who were concerned and so spoke in arguing for adoption of the Bill of Rights. They warned the voters in 1789 that if this country ever loses its liberty it will be to the central government, not to some foreign country. The difference between the ideological fight for men's minds in the world today in the so-called totalitarian countries and the Western democracies is the rights of the individual. The concept of government in Russia is that the individual has rights only in so far as they advance the interest of the State. The concept of government in these United States is that the government derives its power from the consent of the governed. That is demonstrated everyday in the criminal courts. There are those of us at the criminal bar who believe that we are contributing to the concept of liberty just as much as our brothers, fathers and cousins did in going to war. In two world wars, we fought to make the world safe for democracy. The trouble with America today is that so many more people are willing to die for it than to live for it.

There are no technicalities in the law. A technicality in the law is a point of law a defense lawyer briefed and the prosecution didn't. The law is either that or it isn't. Whatever the law is, it is the lawyer's duty to see that it is enforced. The defense lawyer enforces the law against the state. The state enforces the law against the alleged offender. I don't know any defense lawyer that doesn't hate crime, as such. I certainly do. I wouldn't make a very good defense juror, but I don't think that the law should be violated in order to be enforced. I don't think that an arresting officer has a right to beat a confession, to starve a confession, or to use narcotics to obtain a confession from some poor handicapped defendant.

I wanted to get that point over because it is one of the reasons I came here. I thought, "here is a bunch of people from all over the United States that are communicators." This is the first time I was invited to talk to such people. If I can say one thing which makes you better understand, then you may talk to somebody else. I don't expect my comments to even be needed by you, but I do hope that you will understand the position of a defense lawyer in criminal cases.

Actually, criminal work is only half of my practice. I am a trial lawyer. I try any kind of case if I am able to. It has been said that I am a quick learner. Anybody that can try any kind of case, can try any kind of case. You talk about civil lawyers and criminal lawyers, the difference is just a matter of values. Civil lawyers' concern is with money or property. They are either protecting it for the insurance company, or the steam ship lines, or the railroads, or the banks, or they are trying to get it if they are plaintiff lawyers. I tell those when I am talking at a bar meeting, "if you love money more than you do life or liberty then you are justified in confining your practice to civil law; but on the other hand, if you love life or liberty, join us at the criminal bar."

Now we will get away from that part of my communication. I'm just claiming that, because I've got a captive audience. Your conference program lists legal interviewing and counseling. In my office I charge nothing for consultation. A lot of people try to pay me, but I won't let them. I don't see anyone except those with a problem and in the field of law that I would conceivably accept. I only take cases I think I can handle better than anyone else.

Anybody can reach me, Percy Foreman, at any time of the day or night if I am not in court. I don't have an answering service; I answer my own phone. If it rings all night it doesn't bother me because I have never been able to sleep more than an hour at a time. Even in college I kept my books in my bedroom and did all my studying there. I'd go to bed at 7:00pm but I had to to get six hours sleep to get up at six the next morning. I did all my studying in bed in those hours; so it does not bother me to get up at night and I think being available is the first duty of any professional man whether he be a doctor or lawyer. They were asking me about a great Wyoming lawyer. I tried hiring him. "Oh, he is in Europe and won't be back." You try to get my best friend, Racehorse Haynes and they will say, "Oh, he is out on a boat." I don't think that is right. If a man is dependent on the public for his livelihood or pretends to be serving the public as a professional man, I think he owes the same duty to be available to the public as if he worked for one individual.

But that is my idea. I didn't invent that because it was every lawyer's idea a hundred years ago and most of the principles by which I run my practice come from the fact that I knew I was going to be a lawyer when I was 10 years old. The reason I wanted to be a lawyer was because I was in business for myself from the time I was eight. I had a shoe shine stand. By the time I was thirteen I had 15 or 20 other businesses downtown, I mean jobs. I was the only kid in town that worked but I worked everywhere--collected for the meat markets and pressing shops, ran a laundry agency, worked as a plumbing helper laying pipes, made out all the bills for the water works--did everything. I learned to like to work. The greatest business administration courses that I ever had or that anyone else had, I had at the ages of eight and fifteen. I left home at 15, left my home town and went to Houston. I dropped out of school when I was in the 9th grade. I entered another school the next week. I took a business course in the daytime and as soon as I finished the business course I went to night school and did my high school work at night in Houston.

I learned to work and learned to like work and I'd do what I do for nothing if I didn't get paid for it. Since people are willing to pay for it, I'm not allergic to money. As a matter of fact, I have dedicated a large part of my life to disproving the old adage that crime does not pay. I've tried to put it on a paying basis and somebody has to punish these thieves, dope peddlers, murderers. If I don't do it, it doesn't look like the D.A. is going to. It's just a matter of public spirit.

There are a least 500,000 people in Houston that don't know any other lawyer. I have had favorable publicity. One of the truths that I did realize was that in this field of the law you have got to win. You can't afford to lose. If you lose three cases, the headlines and front pages will get the word out that you have lost your rabbit's foot. I didn't take cases I couldn't win and I tried to work hard enough to win. If I had taken every case offered me, I would have just been a mill-run lawyer. The boys and girls of the working press have always been my friends. I had a solid foundation all over Texas among them before anybody outside Texas ever heard of me. There isn't any difference in the so-called named lawyers as far as law ability is concerned. I told

Dr. Crawford today that I found a lawyer that I never had heard of less than six week ago in Amarillo, Texas. He is as good as any lawyer in Texas. Nobody else has heard of him, but he practices law just exactly like I do, or did, when I was his age. He is making some of the same mistakes I did. He takes too much business. I don't take any more business than we can handle.

We don't use investigators. I don't believe in detectives and I won't let one in my office without having all my staff come listen to everything and record the conversation. When one quits working for you, most of them start working for the other side and try to sell the same information. In my office, the lawyer who is going to try the case does his own investigation. Hundreds of times I have found that I have changed my complete defense because I was talking personally to witnesses, some I could not afford to lose.

One time a mother of a defendant was the best witness we had--a man was charged with killing a sheriff's son in East Texas. But she was a picture of an alcoholic addict with bulbous veins over the face, and whiskey blush over that. Her appearance would cancel all of her testimony. Fortunately, she had a heart condition. I had the doctor put her in the hospital, took her deposition and got her testimony without the exposure. Those things the investigator wouldn't even notice perhaps. You have to learn the order in which you are going to present your witnesses. You can't do that if all you have is a bunch of written reports. You will do it according to the evidence rather than according to the effect. You always want your most effective witnesses toward the last--the defendant's mother usually makes an impression, sort of like Whistler's mother.

If the case is one that I might conceivably accept, then I know that before the person gets to my office. Any time someone wants to talk to me, first my secretary asks what it is about, what can I tell Mr. Foreman, etc. Usually these girls have been with me for a long time. One for 38 years. One for 27 years. One for two years. A good secretary is better than a mediocre law partner and mine are paid well. One girl, for about 10 or 12 years, received three checks every pay day. One was for services; one was for putting up with me; and one was for not going to lunch. My people are working people; sometimes they can see it is noon time and I have to work.

I have probably taken part in more divorce cases than any man that has ever lived. I have been practicing for 56 years and I have tried divorce cases wholesale all that time. During the War, '41 to '46, I never had less than 2,000 cases pending; now I have about 200. The Guiness Book of Records gives me credit for the biggest settlement ever made in a contested divorce case, page 134 or 144, I forget the page number, but it's there and has been there for 15 years and they still publish it. There have been bigger settlements than that particular case, but they were not contested. I saved more homes; I tried to save everyone; I discourage divorces. I don't think that there is enough difference in human nature that justifies trading one spouse for another. We all have so much bad in the best of us, and so much good in the worst of us, it hardly behooves any of us to speak ill of the rest of us. It is better to settle this as Hamlet decided than "to fly to ills that we know not of." Sometimes there are cases where divorce is inevitable, but I have saved many homes.

And a lot of legal counseling is women. I can't sell a woman on the fact that her husband is not nearly as bad as the average husband. I suggested that in one case, Hudson vs. Hudson; I made her come to my office and read divorce files for ten days. This kept them together for 13 years. She thought she had the worst husband in the world, but when she read what other women had, why she realized his drinking and carousing were not nearly the worst thing a man could do. I think a lawyer owes that. That is my way of advertising. These lawyers that charge for everything they do, for every telephone call, for every letter they write, leaves me cold. I make more money than they do and one case could pay for all of this time.

Now, legal negotiation and bargaining was this afternoon I believe. Most of that is after the suits are filed and on file. In law school they teach you not to give away your evidence in your pleading. I don't agree with that. When I get through writing a petition, I put everything in it but the kitchen sink. First impressions are lasting impressions and the judge or judges referee, who tries most of the uncontested divorces and non-jury cases, read those petitions. At any rate, if I put it all in there I have more to argue with the lawyer on the other side and I think it helps on the negotiation and bargaining. I never make an agreement in any kind of a case until I am ready to put it into effect. If I make an agreement on Wednesday and your trial is set for the next Monday, you are going to have to start all over again and make another agreement. If you put it into effect, you only have to try that case once. In bargaining by negotiation you get exactly what the other side knows you can take away from them, or a little less. You can't negotiate unless you have a reputation. I had a very important case not long ago. I had been working on it for four years. There were four divorce suits filed, three by the women and one by the man. I hired a lawyer I thought had more control over that particular judge. It didn't do a whole lot of good; but nevertheless, who you are, and what you are, is very important in this negotiation. You are not going to learn magic words to say when you are discussing legal negotiations and bargaining and you better believe you are going to get what the other side will allow you to have. There is an old axiom in the law that says a bad compromise is better than a good law suit. That's true. Even if you win the case you may go through three years of appeals.

Now, the last topic I want to talk about tonight is the one you have listed on your program for tomorrow, that of jury selection. Let me begin by saying that in these past 56 years in the courtroom probably more people have trusted me with their life and liberty than any other man that has walked the earth. You should not be a trail lawyer at all unless you like people. You don't have a lot of option on jury selection. Now they are cutting jury selection in federal court to six jurors in civil suits. I have been on many panels in state bars all over the United States where distinguished lawyers have been giving out their wise, accumulated wisdom, on the selection of jurors. I don't agree with anything they say. A lawyer who says "I always do so and so in selecting jurors" is like a man that would expect to go into a clothing store and find every suit to fit him.

You don't have many options anyway. If you have a six-man jury, they give you twelve to select, each side getting three strikes. They rarely give you any more than two strikes for each side. In some capital cases in Texas, we get 15 strikes, but you can only select from the panel that is given you. You don't have a lot of options. The problem is weighing one juror against the other as to which you are going to take and still stay within your strikes.

There are, of course, a few fundamental things of a universal nature on selection of a jury that I think every trial lawyer in America knows. For example, based on the facts of the case, if you were trying a bar room killing you wouldn't want a Methodist deacon or steward on your jury. He has never been in a bar; he doesn't know the psychology of a bar room. When you select your jury you try to get a jury that can identify with your theory of the case. A lawyer should never look at his case from the standpoint of the defense or the standpoint of the state. He should look at the case from the standpoint of the jury and then try to select a jury from among jurors that can possibly identify. I never take on a jury anyone that deals with slide rulers or figures. I don't want bankers or architects or engineers--anybody where everything has to come out exactly right. That is not human nature. Knowledge of the frailities and foibles of human nature is very valuable in the selection of jurors in a case.

In voir dire I don't pay attention to what a jury or juror tells me in answer to a question. It is the way he tells me. I'm trying a drunk driving code and I say, "Do you have any prejudice against the use of alcohol for beverage purposes?" The way anybody answers that question will tell you more than whatever they say. No one will admit having a prejudice, but the shape of the mouth, the slight delay in the answer, that tells you a whole lot more. The purpose of voir dire is to establish empathy between the lawyer and the juror. At least, that's what I use it for. If you are not permitted to question the panel yourself, you miss that opportunity. This filling out of blanks in advance, which is the tendency now, where, on the first day the jury is there, the court stenographer fills out a bunch of blanks, hands them to you and then you are limited to maybe 30 minutes to select a jury in a death penalty case. That's not fair. In a capital case, I take at least two weeks to select a jury. In some capital cases I have taken as many as five to seven weeks just selecting a jury. Sometimes it takes longer to select a jury than to try the case. It is very important. A man's life is depending on your judgment.

Lastly, let me say I started studying human nature when I was quite young, three, four, five, seven, and eight years old. There was a time when I could size up a person when I was shining shoes by the way they took care of their shoes or the kind of shoes they wore, or at least I thought I could. At least, if you work with any one thing enough you will develop your own theories and to you they will be true. There is nothing true, but thinking makes it so. I still have theories that are satisfactory to me, but they may not mean anything to anybody else unless you have shined shoes a long time. Just common sense is what you use in selecting a jury and in trying any law suit.

*This transcription represents excerpts from Mr. Foreman's Keynote Address which he delivered during the evening of June 24, 1983, following a conference dinner.

LEGAL INTERVIEWING AND COUNSELING

PROGRAM COORDINATOR

JAMES F. WEAVER
DEPARTMENT OF SPEECH COMMUNICATION
IOWA STATE UNIVERSITY

PROGRAM CHAIRPERSON

HENRY L. EWBANK
DEPARTMENT OF SPEECH COMMUNICATION
UNIVERSITY OF ARIZONA

REVIEW OF RESEARCH ON LEGAL INTERVIEWING AND COUNSELING

James F. Weaver

In 1970, Malthon Anapol's article in Today's Speech outlined four lawyering skills: "In the first place, the lawyer is always persuading. He is trying to convince a client or another lawyer's client to accept a point of view based on his prediction of what a court might do. . . . Second, a lawyer seeks to analyze every situation that is brought to him in his professional life. . . .Third, a lawyer must determine the objective facts in every situation. . . .Fourth, a lawyer must deal with and understand people."[1]

DeCotiis and Steele report the results of a 1977 study summarizing lawyering skills as follows:

> The activities seemed naturally to fall into seven categories which were labeled rapport building, advice and consultation, document preparation, negotiation, courthouse activities, continuing legal education, and practice management.[2]

Goodpaster lists the general practice activities of lawyers as: interviewing, advising and counseling, analyzing and planning, influencing, brokering, negotiating and persuading, drafting, researching, information and fact gathering, litigating, and private law-making.[3]

The great majority of these skills are communication skills, primarily speech communication skills. Also, there seems to be one common thread running through these three lists: skills related to interviewing and counseling. DeCotiis and Steele state "attorneys employ a full range of interviewing and counseling techniques when relating to their clients."[4]

Andrew S. Watson in his book The Lawyer in the Interviewing and Counselling Process, points out the inevitability of interviewing and counseling in the legal profession when he writes:

> Counsel will be involved in this interviewing and counselling process throughout his professional career whether he wishes it or not.[5]

Watson further emphasizes the importance of these skills when he continues, "It is unlikely that many lawyers would care to argue against the crucial importance of interviewing skill in most aspects of law practice. No matter what kind of work a lawyer performs, he must constantly obtain information from others by means of interviews."[6]

Harrop Freeman's 1967 survey entitled Counseling in the United States, suggests that some lawyers spend as much as 80 per cent of their professional time in what they classify as counseling--talking with clients on subject matters that do not result in documents, lawsuits, or negotiations with third persons. The average lawyer spends about a third of his time in counseling.[7]

Support for the importance of these interpersonal skills comes from a variety of sources. "An attorney, in the last analysis, may rely far more upon his ability to handle people than on his facility with legal concepts."[8] "As a matter of economic survival, most attorneys quickly become students of the interpersonal relationship, a field largely ignored in the law school curriculum."[9]

The implication thus far, then, is that interviewing and counseling represent important lawyering skills which law schools seem to be slighting. As Freeman concludes, "schools and professionals recognize the important place that counseling plays in practice: that interviewing-counseling should be taught, can be taught, but isn't."[10]

In 1964 Erwin N. Griswold, Dean of the Harvard Law School wrote that the case method "gives the student little or no insight into the problems of dealing with people, to the techniques for finding the facts from people, for advising them effectively, and for aiding them effectively in resolving their own problems and in adjusting their relations with other people."[11]

Gee and Jackson report that "very few students from either class (1960 and 1970) felt that their schools had put great emphasis on communication skills (including counseling and interviewing), on ability to negotiate and arbitrate, on ability to investigate the facts of a case or on proficiency at oral advocacy. In turn, both classes gave support to greater emphasis on the 'practical' skills than they had had in their own legal education." Gee and Jackson conclude: "We are persuaded that students and practitioners are right in insisting that legal education do a more effective job of preparing students for the practical tasks entailed in the practice of law. These include, for example, legal writing, effective oral expression, interviewing, counseling, negotiation, and trial practice."[12]

But Robert D. Abrahams predicts a change of attitude and behavior. "Many law schools now understand that to turn lawyers loose on the community who have never interviewed a live client may be a disservice both to the community and to the lawyer. Law schools will come, more and more, to require practical experience in interviewing clients under the supervision of graduate lawyers."[13] Abrahams made that prediction in 1956. Fortunately, recent surveys show that he was correct. The tide is turning.

Stillman and colleagues reported in the 1982 Journal of Legal Education that at the present time (1982) a majority of ABA approved law schools offer training in interviewing and counseling skills:

> A 1964 survey indicated that only 12 percent of law schools accredited by the American Bar Association (ABA) taught the skill of interviewing or counseling

as either a separate course or part of another course. Nine years later another survey showed that this percentage had risen to 48 percent. At the present time about 60 percent of ABA-approved law schools offer training in such skills.[14]

This paper looks at the major writing on legal interviewing and counseling. Specifically, the purpose of the paper is: 1) to survey the literature on legal interviewing and counseling, 2) to present a list of the major factors involved in legal interviewing and counseling, and 3) to suggest some of the major issues (conflicts) emerging from the literature. The major divisions of the paper are as follows: 1) Interviewing and Counseling Defined, 2) Interviewing Skills, 3) Counseling Skills, 4) Interviewing and Counseling Issues.

Interviewing and Counseling Defined

Legal Interviewing

Harrop Freeman offers several definitions of interviewing: "face-to-face conference, conversation for a professional purpose, or gaining information for the purpose of helping people."[15]

From speech communication literature, Downs and colleagues define an interview as "a specialized form of oral, face-to-face communication between people in an interpersonal relationship that is entered into for a specific task-related purpose associated with a particular subject matter."[16]

Goodale defines a counseling interview as a "discussion between two people in which one is asking the other for assistance with a problem or predicament."[17]

Hunt agrees with Heller, et. al. when he writes that "the legal interview is but one type of relatively formalized and stereotyped communication, taking place between two people one of whom is operating under the assumption that he is in need of legal counsel. It is both an art and a technique which enables the practiced lawyer to communicate in both directions. . .with his client toward the purpose of helping that client."[18]

Legal Counseling

Redmount and Shaffer define "counseling, including legal counseling, /as/ a type of relationship between human beings. Counseling distinguishes itself, however, in being a relationship directed toward a helping purpose."[19]

Freeman says that "counseling is interpersonal cooperation and can be broadly defined as verbal or non-verbal advice, guidance or direction for a person submitting or constituting a problem."[20]

Schoenfield and Schoenfield define counseling as a "relationship marked by non-judgmental understanding and acceptance, in which the interviewer is viewed, to some degree, as merely a technical advisor."[21]

Gorden lists counseling as the "process of helping a client identify, cope with, or resolve a problem (in which the client is personally involved) through face-to-face interaction between the client and counselor."[22]

"Counseling," writes Cottle, "as discussed here is the psychological process by which a professional person helps a relatively normal client explore, understand, and accept behavior so that future behavioral choices can be made."[23]

Interviewing and Counseling Compared

Before leaving the definition section, one might ask what is the difference between these two concepts? How do they compare? Where does one stop and the other start? How much overlap is there? Freeman in his book Legal Interviewing and Counseling offers these possible comparisons:

> Interviewing and Counseling may be viewed in many ways: (a) interviewing as information-getting, counseling as advice-giving, (b) interviewing as procedure, counseling as substance, (c) interviewing as a tool, counseling as a process, (d) interviewing as the preliminary step, counseling as the final stage, (e) both as an interpersonal relationship with activity flowing in two directions, (f) both as methods for the solution of problems revealed.[24]

Interviewing Skills

This section of the review looks at the major steps or stages, the major skills in the interview process. At least initially, this writer has attempted to arrange the topics chronologically, realizing that after a while, it is not possible to predict what will come next in an interview. At a certain magical moment, maybe too late for some readers, we will leave interviewing and begin discussing counseling. Realistically, the interviewer might "jump" into counseling much earlier, depending upon the nature of the problem being discussed and the condition or state of the client.

Purpose and Function

Having offered some definitions above, we will now present a list of functions or purposes of the interview. As with the definitions, there does not seem to be a great deal of disagreement among the writers as to what must be accomplished. Goodale lists "problem definition, problem solving, action planning, and assignment responsibility for action."[25] In one of the more practical and useful articles, Schoenfield and Schoenfield write that the general purposes of the first interview are initially "to develop rapport, secondly to gather information, and finally to advise and counsel the client."[26]

Describing it all a little more specifically and adding a legal emphasis, Freeman says "we must get all the facts. We must find what solution the client desires. We will apply our knowledge of law (and hopefully of human dynamics) to outline the alternative potential solutions, and we will give advice. Finally, we will attempt to gain the client's cooperation in accepting and utilizing some or all of the counsel."[27] Virginia Anne Church in her article "People Come to Lawyers Wanting Good Parent, Magical Bodyguard, and Political Ally With Muscle," offers the most humorous description of purpose and perhaps the most realistic:

> The client seems to hope for a combination: good (dependable, accepting) parent (Mommy and Daddy could be believed capable of solving any problem); magical bodyguard; and political ally with muscle. Once selected, the lawyer is supposed to divine the client's need and the true facts, with little or no help from client, and somehow reach a favorable solution which is not too costly in time, money, or required behavior changes. Quite an order![28]

Cohn's list of functions is quite similar to Schoenfield and Schoenfield's with the addition of "determining whether or not the parties wish to work together."[29]

Preparation

The attorney must first consider preparation for the interview. Realistically, it may be that an unknown client just walks in for advice. Staff should be trained to obtain from the client a general description of the problem area when making an appointment with the client. All of this should be accomplished with an eye toward privacy and confidentiality. Such advance information will allow the attorney to check particular points of the relevant law. When the appointment is made the potential client should also be asked to "bring documents or other information"[30] relevant to the case. For many reasons it can be a good idea for the attorney and client to talk briefly by telephone before the interview. Such a conversation will allow the lawyer to "screen a client and the matters for which representation is sought--not to solve his problems or to give free legal advice."[31] Again such a procedure will give the interviewer time to prepare for the session. If the new client has been referred by a current client, the referral source is extremely important in providing the attorney with insight into the prospective client. Savitz suggests that the referral source should "be used both prior to and after the initial interview."[32] It would appear that such a procedure would have to be handled delicately and only after contacting the prospective client by telephone.

If time allows, and the specific area of concern is known, the client might be asked to complete and send a questionnaire to the attorney in advance of the interview.[33] Such advance information will be of great benefit. In addition to saving time, such a procedure might help the interviewee focus upon the problem.

A final, serious suggestion for preparation comes from a wide variety of sources in the literature and is expressed quite straightforwardly by Hegland:

> First realize in the abstract that you have prejudices and blind spots which will affect how you define and solve your client's problem. Second, try to realize what these actually are. Become aware of your reactions to people and situations as you experience them.[34]

The warnings issued are quite similar. The solution is controversial and will be discussed later in the "issues" section. Freeman simply suggests that "it is wise that each lawyer make a catalogue of his own prejudices, his list of 'unpardonable sins.' He should examine his attitude toward this type of problem, this client. We all have these feelings, we tend to assume they are 'right.' We should not deny the feelings but rather learn to recognize they exist and to control them."[35]

Saxe discusses the practical reason for this need for self-understanding. "The attorney's ability to understand his feelings toward the client, in addition to his professional knowledge, skill, and experience, lays the groundwork for the future lawyer-client relationship. If the attorney is reasonably secure and free in his own personality he can be open and natural in discussing all matters of the case with his client."[36]

Physical Setting

Having completed the preparation step, we will look at another concern which should occur prior to the actual interview, consideration of the physical setting or place for the interview. Although this step seems obvious, Freeman found that lawyers are most likely to overlook the consideration of setting for the interview.[37]

Those persons who have written about the physical setting for an interview seem to be in agreement about the important elements. Schoenfield and Schoenfield suggest that "the interview should take place in physical surroundings that are conducive to business-like attentiveness, quiet ease, and privacy. This atmosphere should extend to the waiting room as well."[38] Cohn states it simply, the interview should "be conducted in a physical setting which assures privacy, comfort, and freedom from distraction."[39] Watson concurs.[40] Privacy includes getting rid of third parties and letting the client "sit where the door is within their field of vision. Thus they are able to see that the door is closed and no one is entering."[41] In terms of lighting, the lawyer should avoid creating the 'grilled suspect' effect, with lighting in the eyes of the client.[42]

Where the client and attorney sit in relation to each other can have a significant impact upon the interview. Freeman suggests that while a desk may enhance the 'authority figure' it may also constitute a barrier.[43] Those attorneys who need the desk "may wish to have the client's chair placed alongside the desk so that the desk is not an obstacle between the two parties."[44] Schoenfield and Schoenfield conclude that the best way to handle the situation is to set up the office with "chairs spaced at various distances to permit the clients to choose the spatial relationship."[45]

The client should have the attorney's undivided attention. If possible, telephone calls should be answered in the main office and no one should enter the room during the interview.

The length of the interview seems to be very much a matter of personal preference. Some attorneys believe that they can get enough information within thirty minutes to an hour, while other persons want to block out two to three hours for the first meeting. Freeman writes that "few interviews are productive beyond an hour, that an interval of several days between interviews permits both interviewer and interviewee to orient the material, but that something is lost when more than a week intervenes."[46]

Agenda

Setting an agenda is the next item of concern. Although most writers agree that there should be some structure, there is not much support for a strict pre-arranged organizational structure. Schoenfield and Schoenfield offer a middle ground approach by suggesting that the attorney "may need to maintain a mental checklist of the points to be covered; a strict agenda, however, should not be used."[47]

Hegland urges the attorney to think about what the client might anticipate. Be sure these questions are answered during the course of the interview:

> How long will the interview be? And is there a fee for the interview? By coming to this lawyer, does it mean that I am more or less committed to hire him? Will I know his fee before hiring him? Will he ask all the questions or will I be expected to tell the story? How can I tell him what is important? I'm not a lawyer.[48]

As for an exact starting point, maybe it should be left up to the client. Savitz reminds us that "when the client arrives, as far as he is concerned he has the only story in town worth relating. He does not want to hear your comments, amenities, or jokes. He wants to tell you something, and he is generally overwhelmed by it."[49] Schoenfield and Schoenfield support this view by suggesting that "the interviewer should initially seek to have the client briefly explain the situation as he perceives it. The client is worried and therefore anxious to talk about his problem. The discussion should start in an area chosen by the client, the area in which the client mentally "is at."[50] Freeman summarizes the point. "Good interviewing is to start at home plate.

Start where the client is. Allow him to talk generally at first. Try to get him to begin at the beginning."[51]

Beginning the Interview

Now that the interview is underway, it becomes more difficult to structure the suggestions and findings from the research. Freeman makes one important point concerning beginnings (and endings). "Pay particular attention to the opening and closing statements. These are often pent up and logicized 'approach' and the final 'this must be gotten out' missing piece to the puzzle."[52]

Rapport

One of the first goals for the attorney is to establish rapport with the client. The only disagreement on this point comes with how and when to do it. Shaffer writes that "lawyers often attempt to fashion a similar communication of openness by beginning the conversation with small talk, or offering the client refreshment."[53] Remember Savitz said earlier that the client wanted to get right down to business, especially if the meter is running. So, the attorney will have to deal with that pressure and try to establish confidence, trust, and openness as the interview goes along. Freeman says "the lawyer will find his own methods of establishing relationship. . . .He should be friendly and informal, but professional."[54] The reason for this concern about rapport-building is simple. Plotnick reminds us that "a client will be reluctant to divulge the information that is essential for the preparation of a thorough estate plan unless he has confidence in the attorney."[55] The client must feel that it is "safe" to discuss personal matters freely with counsel.[56]

The remaining interviewing techniques will be divided into five main divisions: listening, questioning techniques, general techniques, discussion of the fee, and taking notes.

Listening

The attorney will be judged ultimately upon what he/she says to and does for the client. The major source of information upon which the attorney must base future action will eventually come from the client. These two statements point out the importance of listening. Unfortunately, the ability simply to sit and listen effectively is not widely possessed.[57] The attorney who is accustomed to speaking, persuading, bargaining, arguing, competing, must now take on a very different and probably quite difficult role. The interviewer is looking for three things--which include everything: what is said, what is not said, and how it is said or not said. Schoenfield and Schoenfield capture the essense of this point when they write, "every aspect of the client's communication, each word, gesture, and expression, has meaning. There is a reason for everything done or said. Listening and perceiving all that occurs is extremely difficult and requires great concentration."[58] Watson writes "everything a person says and does in an interview (as well as everywhere else) means something."[59]

> The client is communicating to you as interviewer not merely verbally but non-verbally. He nods, smiles, grimaces, stammers, blushes, sweats, shakes, shows a tic, lights a cigarette, crosses his legs, loosens his collar, etc. This "body language" often carries more content than spoken language. "Listening" thus must become a receptive ear and an observant eye. . . .Try to exhaust the client's information. Watch out for irrelevant, vague, general, ambiguous expressions. Clarify what is unclear before moving on. Spoken language can be unconsciously as well as consciously motivated.[60]

But what about what is not said? Silence on the part of both parties can communicate. The attorney-interviewer should watch for "pauses, hesitation, silences, averting the eyes (that is, absence of words or actions) are also communicative."[61] The interviewer "may use the technique of silence to indicate he is unhurried and secure, or to create a thoughtful mood, or to allow client free thought without interruption, or as an invitation."[62]

One important aspect of effective listening is response. Eventually, and probably sooner than later, the interviewer must respond to the interviewee. Empathy is the key here. This concept is mentioned in practically every article on interviewing and counseling. Quantity of coverage exceeds quality of coverage in this case. Authors offer four suggestions as to how to communicate empathy. First, the interviewer should show professional interest in the client and his/her problem.[63] Second, the interviewer should show interest and caring for the client.[64] Third, empathy is shared identification; it is to "feel with" rather than "sorry for" a person.[65] Fourth, Hegland suggests that the interviewer should be "non-judgmental" but avoid being indifferent or expressing approval.[66] Schoenfield and Schoenfield write that the "interviewer must be non-judgmental regarding the goodness or badness of the client as a person.[67] Kelso exemplifies the nonevaluative manner with the statements "you seem to be angry about that, or so the boss made you angry?"[68] Although such responses may seem particularly difficult, Redmount stresses the importance: "The principle behavior that sustains human relations is empathic communication."[69]

Questioning Techniques

For many persons the terms 'question' and 'interviewing' are synonymous. Note that the words questions or questioning do not appear in any of the definitions of interviewing presented earlier. Rather, you will find conference, conversation, communication, and discussion. Our definitions of counseling include words such as: relationship, interpersonal cooperation, advice, guidance, direction, understanding, and acceptance. Of course, questioning is an important interviewing skill, but should not be overemphasized. The successful interviewer should know the difference between open vs. closed questions, and direct vs. indirect questions.[70] Studying the various types of questions at his/her disposal will assist the interviewer achieve the goals of interviewing and counseling: open or closed, primary or secondary, neutral or leading.[71]

General Techniques

There is a long list of general interviewing techniques, all intended to achieve the goals of getting information, establishing rapport, and to advise and counsel. Gorden is probably best known for his list of eight inhibitors of communication. An inhibitor is seen as a barrier or obstacle to communication that should be avoided, circumvented, or removed from the respondent's mind. Four inhibitors make the client unwilling to give information: competing demands for time, ego threat, etiquette, and trauma. Four inhibitors make the client unable to report relevant information: forgetting, chronological confusion, inferential confusion, and unconscious behavior.[72] Gorden also presents eight facilitators to communication: fulfilling expectations, recognition, altruistic appeals, sympathetic understanding, new experience, catharsis, the need for meaning, and extrensic rewards.[73]

Schoenfield and Schoenfield also discuss a number of techniques which will aid the interviewer: checking and probing; leads and responses--including elaboration and clarification, explanation, ridicule, and repetition and interpretation.[74]

Discussion of Fee

It is generally recommended that there be some mention, usually very specific, of the fee for the initial interview and the fee for later service. Schoenfield and Schoenfield present evidence that "80 per cent of clients want the fee clearly discussed in the first interview, and in many cases the attorney fails to do so."[75] Most writers are very straightforward on the issue. Beck writes, "discuss your fee during the first interview before the client brings up the subject."[76] Savitz concurs: "At the initial interview, the client is entitled to learn two things: What, if anything, you can do for him, and how much it is going to cost him."[77] The range of opinion, however, is wide. Hegland contends that he would "drop the business about the initial fee being only $15."[78] Although Savitz writes that the client is entitled to know what the fee is, he says that "contrary to the view of other attorneys, I believe that the initial interview with a client on any matter should be without charge."[79]

Note Taking

Savitz says, "Do not just sit and listen; take notes. The client will be impressed by your interest in what he is saying."[80] Most other writers contend that "just taking notes" is oversimplifying it just a bit. Taking notes can detract from effective listening. Taking notes during the interview can negatively affect the client. There is no doubt that an accurate record of the interview can prove invaluable at a later time. The question is when and how to do it. Schoenfield and Schoenfield make three suggestions: 1) prepare a record of what transpired after the interview is completed, 2) keep key word notes which can be used to make a more complete record after the interview, 3) have the client tell the complete story without taking notes, then take careful notes on the second time through the story.[81]

Counseling Skills

Purpose and Function

Five definitions of counseling were offered earlier in the paper. In simplest terms the legal counseling session is designed to give advice and guidance. Of all the types of interviews, the counseling interview is most likely to be unplanned and unstructured, and it probably requires the highest degree of sensitivity from the interviewer.[82] Redmount and Shaffer list these five functions of counseling: persuasion and advice, facilitation, protection, prevention, and correction.[83]

Analyzing the Client's Problem

In this context, analysis means a kind of sharpening and arranging of all of the data presented by the client. The aim of analysis is not so much to arrive at a correct solution as for a viable and acceptable solution.[84] A number of factors can hamper clear analysis of the client's problem.

The attorney must not be surprised by the nature of his/her client's problem. In all probability, the problem will be non-legal in nature.[85] These non-legal problems range from business difficulties to social agency assistance, with food or shelter or the need for psychotherapy. "If a client has a non-legal question but unconsciously feels more comfortable seeing an attorney, he will naturally frame the difficulty in a legal context to justify his choice of a professional."[86]

The attorney must guard against selective perception. Transferred to the practice of law, this means that an attorney should make every attempt to suspend judgment, look for alternatives, and always consider what can be said "the other way."[87] For the beginner, who wants to win, there is a tendency to overlook the negative aspects of a client's case.[88]

The interviewer should resist the temptation to offer advice before it is appropriate. Hegland reminds us that bad legal advice comes from the pressure to "say something." Good advice comes with reflection. Clients can be just as impressed with the fact that you are doing something as with the fact that you have offered instant answers.[89]

Decision Making and Implementation

Once the analysis is completed, the interviewer's counseling function is dependent upon who makes what determinations--the lawyer or the client.[90] The attorney has an obligation to advise his/her client of all relevant considerations before a decision is made.[91] Hegland says that "in counseling, you are an educator, not a decision-maker. Your job is to present the alternatives and explain their ramifications. It is the client who decides."[92]

Normally, the client makes the strategic decision, deciding upon the general direction of the decision. The attorney should almost always decide the tactical issues.[93]

Implementation is, in substance, the translation of decision into action. Mostly, it is incumbent on the legal counselor, as distinguished from the client, to implement. It is the attorney who must draft a will or contract, file a complaint or answer, or whatever.[94]

Ending the Session

Termination of the interview and counseling session can be just as important and complex as the beginning. By the end of the interview the client should feel that the major purposes of the interview have been accomplished. Relationship and rapport have been established. The attorney is fully and truthfully informed as to the client's problem. The client is well on the way toward deciding whether or not he/she would care to have this attorney represent him/her. Some advice has been given and well-accepted.

> At the end of the interview, the client will want to know "What happens next?" Tell the client what you intend to do and what he should do pending the next appointment. A written list of things to do serves both as a reminder and a catalyst.[95]

Above all, the client should be kept informed. Send copies of all letters that have been drafted, all trial briefs, all appellate briefs, all pleadings. By this simple approach, the client sees the effort and work involved in his legal matter.[96] Let the client know of your availability. If your normal schedule calls for you to be available only at certain times of the day, this should be made known to the client.[97]

Issues in Legal Interviewing and Counseling

For the most part, there are not a tremendous number of conflicts concerning methods and procedures of legal interviewing and counseling. This review of the writing on the subject reveals at least six areas which merit brief comment and probably future research.

Setting for the Interview

The literature would seem to suggest that most legal interviews take place in the attorney's office. Savitz goes so far as to say that "the initial interview must be in the attorney's office, because his workshop is there. Here the client views the staff; here he sees what he has to see in order to evaluate the attorney."[98] Freeman indicates that interviewers in his survey "record greater difficulty in meeting an interviewee in his own home or work place, for there the interviewer is not in control, cannot set the tone and is unable to turn aside the local distractions. In his office the lawyer should assure privacy, comfort, and freedom from distractions."[99]

The evidence seems reasonably convincing on this issue. Unless there is a very good reason, the lawyer should expect the client to come to his/her office, especially for the initial interview.

Discussion of the Fee

It is clear that discussing the legal fee with new clients during an initial interview presents a difficulty for a reasonable number of attorneys. Kelso writes that the Code suggests early discussion of this matter. "Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client."[100] Kelso suggests that for some attorneys "the desire to help somehow seems incompatible with charging fees. In addition to the help/charge conflict, there is the further question of discussing the amount of the fee. Some lawyers may feel that discussing prices and fees with clients, while necessary, is somehow 'unprofessional.'"[101]

This writer imagines that this is one conflict that experience will take care of.

Taking Notes

The best procedure for taking notes is controversial because of the many possibilities available. Audio and video taping were not mentioned earlier in the paper, but remain a possibility both to ease and complicate the matter. It is likely that if notetaking can distract the client, audio and video taping might be even worse. An occasional audio taping of the interview, with permission of the client, might serve as a learning tool and a check upon accuracy of notes taken using the more traditional method.

If the attorney can learn to write quickly, the advantages of having a written record of the interview seem to outweigh the major disadvantages. Benjamin lists some useful cautions for the interviewer to keep in mind. "Don't let note-taking interfere with the flow of the interview. Don't be secretive about the taking of notes lest this arouse the anxiety or curiosity of the interviewee. Finally, don't write down things (in the presence of the interviewee) that you are not prepared to have him see."[102]

Control of the Interview

The matter of degree of control in the interview-counseling setting is not unique to the legal interview. Nevertheless, this is an issue which must be faced. The amount of control certainly affects both participants. Rosenthal summarizes this issue.

> There are two ideas about the proper distribution of power in professional consulting relationships. The traditional idea is that both parties are best served by the professional's assuming broad control over solutions to the problems brought by the client. The contradictory view is that both client and consultant gain from a sharing of control over many of the decisions arising out of the relationship.[103]

Hegland puts the issues in practical terms and offers a rationale for lawyer control. "Why is it so difficult to simply sit and hear the client out? Why is it that we generally jump in and take command at the first glimmer of a legal issue? Partly, I think, it has to do with a basic insecurity with the professional role. Professionals are 'supposed to be' in command. One sure way to be in command is to ask questions. The questioner sets the agenda and forces the other into the subservient position of responding."[104]

The approach featuring strong control is called the directive approach. Zima explains:

> The directive (or old-style) approaches to counseling have been classified as follows: advice, suggestion, exhortation, explanation, reassurance, and reasoning. In using these methods, the counselor actively attempts to modify patterns of behavior by direct intervention. Directive counseling involves hearing the (client's) problem, deciding what should be done, and then telling or selling the (client) on how to carry out the action.[105]

Zima explains the opposite approach:

> . . .a technique called non-directive counseling or client-centered therapy was developed by Carl Rogers, a clinical psychologist. It is based on the assumption that a person will talk about what is on his or her mind if given the time and opportunity to do so by an empathic, understanding listener. Nondirective counseling places heavy emphasis on psychological drainage, catharsis, or ventiliation. The idea is that by skillful interviewing, the counselor gets the client to purge or release his or her emotions (catharsis).[106]

The counseling attorney needs to be familiar with both of these approaches as well as the advantages and disadvantages of each.

Lawyer Characteristics

Earlier in this review, the effects of certain lawyer characteristics were discussed. One issue practically ignored up to this point in the paper is what some writers hypothesize is the cause of the desire to control on the part of the attorney.

> Lawyers often have conflicting feelings about how active or passive they should be in interviewing the client. The pressure to be active often results from the lawyer's typically felt need to be in control of the case and his time.[107]

Schoenfield and Schoenfield face the issue squarely when they write: "The techniques that are useful in performing other professional functions often hinder attorneys in providing counseling. Counseling requires empathetic communication, characterized by concern, helpfulness, a desire for understanding and agreement, and dispassionate overview. Since most other attorney activity calls for gaining or preserving an advantage over others by aggressiveness, confrontation, manipulation, and narrow partisanship, the legal profession tends to mold persons into a style of life and relationships that generally reflect the latter traits rather than the former."[108]

Attorneys should be aware of the potential conflict when engaged in the interviewing-counseling role.

Know Thyself--But How Well?

In presenting the steps of preparing for the interview, the suggestion was made that the prospective attorney-interviewer should be sensitive to his/her own prejudices and biases. The attorney should seek complete understanding of his/her own weaknesses. In order to know others, the attorney must know him/herself. To that point there does not seem to be much controversy. At least two sources go several steps further. They suggest that the counselor should seek analysis for maximum understanding of him/herself and understanding of others.

Saxe states it simply, "it is respectfully submitted that optimally the prototypical attorney should himself have undergone some formal psychoanalysis or psychotherapy."[109] Watson concurs: "I have often been queried about whether or not lawyers, judges, and other professionals should be 'psychoanalyzed.' . . . .I would think it a wise investment for any working lawyer to have this experience if he can get it."[110]

Conclusion

The main ideas seem to be these. The practicing lawyer performs many skills. Many of these are oral communication skills. Among the most important and time-consuming are skills related to interviewing and counseling. Law schools have been slow to recognize this, though recent evidence seems to suggest that a majority now have courses available in interviewing and counseling. Interviewing and counseling were defined as face-to-face conversation for a professional purpose, for the purpose of helping people. Interviewing is viewed as the preliminary step, counseling as the final stage.

The paper has reviewed the major factors related to legal interviewing: purpose and function, preparation for the interview, physical setting for the interview, agenda for the interview, beginning the interview, establishing rapport, listening, questioning, general techniques of interviewing, discussion of fee, and taking notes during the interview.

The following counseling skills were reviewed: purpose and function, analyzing the client's problem, decision making and implementation, ending the session.

Finally, the author examined six issues relating to legal interviewing and counseling: setting for the interview, discussion of the fee, taking notes, control of the interview, lawyer characteristics which work to the detriment of the interview, and the need for psychoanalysis for prospective lawyer-counselors.

Lawyers *do* counsel, whether they want to or not and whether they are trained or not.[111] It is hoped that this present effort will assist those who counsel, those who train the counselors, and those who wish to do further research in the area.

End Notes

James F. Weaver is an associate professor in the Department of Speech Communication at Iowa State University in Ames, Iowa.

[1] Malthon Anapol, "Rhetoric and Law: An Overview," *Today's Speech*, 18 (Fall 1970), 18. Most of the articles surveyed are written by males who assume that all attorneys and clients are males. The author has not attempted to change the sexist language of the quotations used. However, the author's own language acknowledges that there may be female interviewers and interviewees.

[2] Thomas A. DeCotiis and Walter W. Steele, Jr., "Lawyering Skills: A Critique," *Trial*, 13 (August 1977), 30.

[3] Gary S. Goodpaster, "The Human Arts of Lawyering: Interviewing and Counseling," *Journal of Legal Education*, 27 (1975), 11.

[4] DeCotiis and Steele, p. 30.

[5] Andrew S. Watson, *The Lawyer in the Interviewing and Counselling Process* (New York: Bobbs-Merrill Co., Inc., 1976), p. 158. Watson has chosen to use counse*ll*ing. The present author and all other sources quoted in the paper prefer counse*l*ing.

[6] Watson, p. 1.

[7] Thomas L. Shaffer, "Lawyers, Counselors, and Counselors at Law," *American Bar Association Journal*, 61 (July 1975), 854.

[8] See Chapter 11 in Martin G. Blinder, *Psychiatry in the Everyday Practice of Law* (Rochester, New York: Lawyer Cooperative Publishing Co., 1973), p. 177.

[9] Blinder, p. 177.

[10] Harrop A. Freeman, *Legal Interviewing and Counseling: Cases With Comments* (St. Paul: West Publishing Co., 1964), p. 2.

[11] Freeman, p. ix.

[12] E. Gordon Gee and Donald W. Jackson, "Current Studies of Legal Education: Findings and Research," *Journal of Legal Education*, 32 (1982), pp. 479 and 504.

[13] Robert D. Abrahams, "Interviewing 'Small' Clients," *The Practical Lawyer*, 2 (March 1956), 77.

[14] Paula L. Stillman, Andrew S. Silverman, Michele Young Burpeau, and Darrell L. Sabers, "Use of Client Instructors to Teach Interviewing Skills to Law Students," *Journal of Legal Education*, 32 (1982), 395

[15] Freeman, p. 5.

[16] Cal W. Downs, G Paul Smeyak, and Ernest Martin, Professional Interviewing (New York: Harper & Row Publishers, 1980), p. 5.

[17] James G. Goodale, The Fine Art of Interviewing (Englewood Cliffs, New Jersey: Prentice-Hall, 1982), p. 105.

[18] Raymond S. Hunt, "Problems and Processes in the Legal Interview," Illinois Bar Journal, 50 (April 1962), 727.

[19] Robert S. Redmount and Thomas L. Shaffer, Legal Interviewing and Counseling (New York: Matthew Bender and Co., Inc., 1980), p. 19-11 (Chapter 19, page 11).

[20] Freeman, p. 48.

[21] Mark K. Schoenfield and Barbara Pearlman Schoenfield, "The Art of Interviewing and Counseling--Part 2," The Practical Lawyer, 24 (March 1978), 55.

[22] Raymond L. Gorden, Interviewing: Strategy, Techniques, and Tactics (Homewood, Illinois: Dorsey Press, 1980), p. 465.

[23] William C. Cottle, Beginning Counseling Practicum (New York: Grune & Stratton, 1973), p. 51.

[24] Freeman, p. 5.

[25] Goodale, p. 108.

[26] Mark K. Schoenfield and Barbara Pearlman Schoenfield, "The Art of Interviewing and Counseling--Part 1," The Practical Lawyer, 24 (January 1978), 67.

[27] Freeman, p. 49.

[28] Virginia Anne Church, "People Come to Lawyers Wanting A Good Parent, Magical Bodyguard, and Political Ally With Muscle," Student Lawyer (December 1973), 12.

[29] Louis J. Cohn, "The Initial Client Interview--A Critical Point in the Relationship," Illinois Bar Journal, 67 (November 1979), 178.

[30] Schoenfield and Schoenfield, Part 1, p. 73.

[31] Joseph H. Savitz, "How to Handle a New Client--The Initial Interview With a Business Client," The Practical Lawyer, 21 (December 1975), 14.

[32] Savitz, pp. 13-14.

[33] Gary Bellow and Bea Moulton, The Lawyering Process (Mineola, New York: Foundation Press, 1978), pp. 132-33.

[34] Kenney F. Hegland, Trial and Practice Skills in a Nutshell (St. Paul: West Publishing Co., 1978), p. 214.

[35] Freeman, pp. 50-1.

[36] David B. Saxe and Seymour F. Kuvin, "Notes on the Attorney-Client Relationship: A Psycholegal Overview," Journal of Psychiatry and Law, 2 (1974), 209-10.

[37] Freeman, p. 7.

[38] Schoenfield and Schoenfield, Part 1, p. 69.

[39] Cohn, p. 178.

[40] Watson, p. 5.

[41] Schoenfield and Schoenfield, Part 1, p. 69.

[42] Freeman, p. 8.

[43] Freeman, p. 8.

[44] Cohn, p. 178.

[45] Schoenfield and Schoenfield, Part 1, p. 69.

[46] Freeman, p. 8.

[47] Schoenfield and Schoenfield, Part 1, p. 72.

[48] Hegland, p. 194.

[49] Savitz, p. 17.

[50] Schoenfield and Schoenfield, Part 1, p. 73.

[51] Freeman, p. 14.

[52] Freeman, p. 14.

[53] Thomas L. Shaffer, Legal Interviewing and Counseling (St. Paul: West Publishing Co., 1976), p. 27.

[54] Freeman, p. 10.

[55] Charles K. Plotnick, "How to Handle the Will Interview," The Practical Lawyer, 23 (July 15, 1977), 82.

[56] Watson, p. 7.

[57] Watson, p. 29.

[58] Schoenfield and Schoenfield, Part 1, p. 73.

[59] Watson, p. 16.

[60] Freeman, p. 11.

[61] Freeman, p. 12.

[62] Freeman, p. 10.

[63] Schoenfield and Schoenfield, Part 1, pp. 71-72.

[64] Redmount and Shaffer, p. 19-22 (Chapter 19, page 22).

[65] Freeman, p. 15.

[66] Hegland, p. 205.

[67] Schoenfield and Schoenfield, Part 1, p. 72.

[68] Charles D. Kelso and C. Kevin Kelso, "Conflict, Emotion, and Legal Ethics," Pacific Law Journal, 10 (January 1979), 85.

[69] Robert S. Redmount, "Attorney Personalities and Some Psychological Aspects of Legal Consultation," University of Pacific Law Review, 109 (1961), 972.

[70] Schoenfield and Schoenfield, Part 2, pp. 47-48.

[71] Charles J. Stewart and William B. Cash, Interviewing Principles and Practices (Dubuque: William C. Brown, 1982), p. 75.

[72] Gorden, pp. 88-104.

[73] Gorden, pp. 107-121.

[74] Schoenfield and Schoenfield, Part 2, pp. 41-47.

[75] Schoenfield and Schoenfield, Part 2, p. 55.

[76] Bernie Beck, "The Satisfied Client: Key to Increased Income," Kentucky Bench and Bar, 41 (July 1977), 30.

[77] Savitz, p. 21.

[78] Hegland, p. 194.

[79] Savitz, p. 14.

[80] Savitz, p. 18.

[81] Schoenfield and Schoenfield, Part 1, p. 70.

[82] Goodale, p. 105.

[83] Redmount and Shaffer, Chapter 19, page 34.

[84] Redmount and Shaffer, Chapter 19, page 26.

[85] Shaffer, p. 2.

[86] Schoenfield and Schoenfield, Part 1, p. 68.

[87] Kelso, p. 87.

[88] Hegland, p. 207.

[89] Hegland, p. 211.

[90] Schoenfield and Schoenfield, Part 2, p. 51.

[91] Kelso, p. 89.

[92] Hegland, p. 304.

[93] Schoenfield and Schoenfield, Part 2, p. 51.

[94] Redmount and Shaffer, Chapter 19, p. 28.

[95] Hegland, pp. 195-96.

[96] Beck, p. 30.

[97] Cohn, p. 182.

[98] Savitz, pp. 15-6.

[99] Freeman, p. 7.

[100] Kelso, pp. 83-4.

[101] Kelso, p. 83.

[102] Alfred Benjamin, The Helping Interview--Third Edition (Boston: Houghton Mifflin Co., 1981), pp. 62-3.

[103] See Douglas E. Rosenthal, Lawyer and Client: Who's In Charge? (New York: Russell Sage Foundation, 1974), Chapter One.

[104] Hegland, p. 197.

[105] Joseph P. Zima, Interviewing Key to Effective Management (Chicago: Science Research Associates, Inc., 1983), p. 322.

[106] Zima, p. 323.

[107] Kelso, p. 84.

[108] Schoenfield and Schoenfield, Part 1, pp. 67-68.

[109] Saxe, p. 216.

[110] Watson, p. 83.

[111] Freeman, p. 56.

FROM THE LEGAL PROFESSION: LEGAL STRATEGIES AND RESEARCH NEEDS IN INTERVIEWING AND COUNSELING

Kenney Hegland

The following are two chapters from my book, Trial and Practice Skills in a Nutshell (West 1978). The book is designed for beginners, either law students taking clinical law courses or lawyers just starting out. In addition to covering interviewing and counseling, the book covers trial skills (opening and closing argument, direct and cross-examination) and "office" skills (legal problem solving, investigation, discovery and negotiation).

The following chapters explicitly raise strategies in interviewing and counseling and implicitly identify research needs - to what extent do models presented work and how they can best be taught? Rather than preparing a paper expressly on these strategies and research issues, I though that it would be more beneficial for participants to react to a model that is actually presented to practitioners. This approach will surely be more beneficial to me, if not for you. I expect to learn much from your reactions and criticisms.

INTERVIEWING

Going to a law office for the first time, likely the person won't know what to expect. Perhaps there will be a large waiting room filled with disgruntled heirs, disappointed offerees, and despairing tort feasors. And, of course, their hungry and quite dissatisfied children. Lucky to get the last torn copy of Time, the first-time client reads, and rereads, "1968 Democratic Presidential Sweepstakes--The Hopefuls." Finally his name is called and he is shown into one of the many small rooms off the central corridor. On the desk, a Blackstone's Commentaries, legal pad, and number two pencil. Next to the desk, a somewhat unseemly wastepaper basket partially filled with crumpled yellow legal sheets. The client is asked to sit: "The lawyer will see you as soon as possible. We are very busy; people are extremely contentious this time of year." Time passes slowly and the client becomes obsessed with whether or not he should risk looking through Blackstone.

Suddenly the door opens and the lawyer bustles in, glancing first at the client, then at the client's file, finally at his watch. Three insightful questions later, he concludes "I must give you a codicil."

The client, of course, has totally forgetten his legal malaise; his only thought:

"Oh, no. I forgot to shower."

I. Telling the Client What to Expect

Early on in the initial interview, after the pleasantries, tell the client what is generally going to happen during the interview.

> Before we begin, let me tell you something about how I conduct an interview. During the first five to ten minutes, I want you to tell me everything about what brings you here. Begin at the beginning and tell me everything you think is important. I probably won't ask many questions during this time, I will save them till later. Before I jump in with a lot of questions, I want a fairly good idea of what your problem is and what you want done about it.
>
> When you are finished, I will ask some questions in order to clear up things in my own mind. If you think of anything to add, let me know. It's very important that I know as much as possible about your legal situation.
>
> We'll then discuss whether or not you need the services of a lawyer. Often people don't need a lawyer so much as an understanding of what the law requires. Perhaps you need only a little advice. I want to stress that at the end of the interview, you should feel perfectly free to hire another lawyer. It is very important that clients and lawyers trust and respect each other if they are to work well together.
>
> The fee for this 30 minute interview if $15.
>
> Any questions before we begin?

Your approach naturally will vary with the client. The alternative of self-help, for example, is probably not appropriate if the client is charged with murder. Similarly, the President of I.B.M. might find it difficult to compress his corporate woes into the five to ten minute period. (And, if it were me, I would drop the business about the initial fee being only $15). But for each client ask yourself "If I were that client, what anxieties or questions would I have about the interview?" In the typical case, the questions will be:

1. How long will the interview be--ten minutes or two hours? And is there a fee for the interview?
2. By coming to this lawyer, does it mean that I am more or less committee to hire him? Will I know his fee before hiring him?
3. Will be ask all the questions or will I be expected to tell the story? How can I tell him what is important, I'm not a lawyer?

In addition to questions concerning the interview, the client will also be anxious about the "law" and about "what happens next?" Deal with these concerns sometime in the interview.

Laymen know little of, and have a fear of lawyers, the law and courts. As well they might. If you have ever received a court summons, you know it brings terror. Deal with your client's ignorance and fear of the legal system. Failure to do so can have dramatic results. Some criminal defendants jump bail simply because their attorneys never took the few minutes needed to explain their chances of victory and possibilities of incarceration. Many a well-researched brief has followed these defendants out the window. Often one sentence would have done the trick: "Next Thursday's hearing is on our motion to suppress some of the evidence; you won't do to jail then, even if we lose."

At some point in the initial interview, take a few minutes to tell the client where his case fits into the legal structure. In the routine divorce case, for example, it might be well to set out the relevant time frames, (filing, hearing, interlocutory period, final decree), to discuss the possibility and operation of Conciliation Court, to touch upon the law concerning child support and custody. And, although you know that non-contested divorce hearings are a lark, your client probably doesn't (unless, of course, you practice in California):

> "The hearings will be held in about two months. No one will be there except maybe some other lawyers and their clients. The whole thing takes about three minutes."

At the end of the interview, the client will want to know "What happens next?" Tell the client what you intend to do and what he should do pending the next appointment. A written list of things to do serves both as a reminder and as a catalyst.

To recap: before the interview, put yourself in the client's position. What concerns would you have? Generally they revolve around three areas: what will happen in the interview, where the case fits into the law, and what's to happen after the client leaves. During the interview respond to those concerns as well as any others that seem to be bothering the client: "Now, Alex, the reason you got a ninny for a lawyer is that . . .."

II. Getting the Client to Narrate

Far too many legal inerviews go like this:

Attorney: What's the problem?

Client: Yesterday, I was served with process. Seems my brother-in-law is suing me for stock fraud.

Attorney: Tell me more.

Client: What more do you need to know? I'm getting sued. You're not te only attorney advertising on the late show, you know.

Attorney: Yes, I know.

Client: (After a long pause) Well, can you help me or not?

Attorney: It depends. First of all, do you know if the person who served you was under the age of 18?

Beginners often sink in the swamp of specifics--"Accident uh? Was the other driver drinking?" Going 35 in a 25?" "Screaming at his kids?" This approach to interviewing shares many characteristics of the infinite regress. And, despite the example above, it is usually the lawyer's, not the client's, fault.

What is it so difficult to simply sit and hear the client out? Why is it that we generally jump in and take command at the first glimmer of a legal issue? Partly, I think, it has to do with a basic insecurity with the professional role. Professionals are "supposed to be" in command. One sure way to be in command is to ask questions. The questioner sets the agenda and forces the other into the subservient position of responding. Similarily professionals are supposed to "solve" problems. In legal education not much emphasis is given to the process of problem development or definition. There the problems come neatly packaged, together with funny names and hidden issues. In practice you meet, at best, rough drafts of problems. Realize that your first job is to help the client polish his problem before you answer it. And realize too that, in practice, there is no one who will burst into the room to call "Time." Relax.

It is of absolute importance to have the client narrate his problem. First, the checklist approach to interviewing will never capture the client's situation in all of its complexity and humanness. Second, clients seek legal help because they are in trouble; many have not thought out the exact causes of that trouble or have a clear idea of what they want done. These clients need space in which to work things out in their own minds.

During the first part of the interview, repress those flashy insightful questions. The ideal image is of you sitting, listening attentively. Before you begin asking specific fact-gathering kinds of questions, you should have a general feel for:

1. The client's legal problem in its "life-context"--people don't have "tort" problems, they have broken legs and hospital bills.

2. How the client feels about the problem and possible remedies (if he feels he was cheated by the creditor, a new payment schedule will probably not work; if he likes his brother-in-law he probably won't have him arrested).

Checklists can't tell you these things, only clients can. How to get them talking?

A. Making motivational statements

The client may simply assume that he's to sit there and answer your questions. We have already seen one correctional device--at the beginning of the interview, set up the expectation of narration. And, if he follows it, encourage him--"Good, that's exactly the kind of information I need." "You're doing fine."

And what if the client doesn't begin to narrate? Ask yourself why. Perhaps it is the form of your questions--they should be broad and open-ended. They should force the client to talk rather than answering "Yes" or "No." Perhaps the client is having a hard time narrating because the subject matter is threatening. All injuries are not "polite" and all activities are not "respectable." If this is the cause of the client's hesitation, meet it head on: "Many people feel uncomfortable talking about the extent and kind of their injuries. But it really is important that I get a total picture of what happened."

If need be, repeat to the client that you need to have him describe his problem and that you can't ask intelligent questions until you have an idea of what it's all about. "I need to know more about the stock sale. Tell me something about it. How long ago was it? What kind of stock? Why is your brother-in-law upset? Why do you think he is treating you unfairly? Tell me whatever you think is important."

B. Getting used to chaos

Don't expect the client to tell a neat tale. Part of the difficulty that beginners have with interviewing is that they have taken such heavies as "anti-trust" and "estate planning." After these, interviewing brings the condescending smile. "Come on, it's like speaking prose."

This concept is quickly destroyed. To your dismay, you find the dullest of clients challenging the most imaginative law professor in presenting complex and novel questions. What at first appears to be a landlord-tenant problem slowly transforms itself into one of debtor-creditor, then suddenly explodes into a domestic problem and then, finally, slowly filters down into an employment problem. As you slouch dumb-founded in your chair (you gave up taking notes long ago), your client adds, "My son was arrested last night."

Fight your impulse toward simplicity and order. Let the client speak. That he "rambles", that he see relationships between facts that you do not, means either that he is committable or profound. Give him the break--he's paying for it.

C. Getting used to silence

The client suddenly falls silent. And what do you do? Probably jump in and ask a question.

The sounds of silence usually overcome the beginners and force a question or comment. Some are so afraid of silence that they don't even listen. Instead, they are busily thinking of something else to ask when the dreaded moment arrives.

A client may stop talking simply because he has nothing more to say. Then something from you is appropriate. However, his silence may mean that he has seen a relationship between what he has said and something else. It may mean that he is deciding whether or not he should reveal further information. The compulsion to ask a question, to raise the noise lever, may well destroy something important. (One way to avoid some of the embarrassment is not to have the chairs directly facing each other--a slight angle will allow each of you to gracefully glance away).

The fear of silence also leads to problems when it is your turn to talk. Often, you will not have composed your thoughts--resist the pressure to say something of substance. Instead, say "This is pretty complicated. Let me think."

Become accustomed to silence. A simple exercise. Try falling silent in the middle of a conversation, or next time the judge asks you a question.

D. Listen

Often people fail to listen one another. Rather than listening they simply bide their time until it's their turn to talk. The rules of social intercourse seem to dictate this quid pro quo. Reluctantly we all go along with it, wishing, however, that the other person would be slightly less longwinded.

You must learn how to listen to understand. Your concern must be on what the client is saying rather than on what you will say or ask next. If the client senses that you are truly interested in his story, he will open up and narrate it in all of its richness and complexity. Active listening can help.

The goal of client narration is to gain an understanding of how the client views his situation, to understand his concerns and desires. Note that the lawyer's question often will shift the topic from the client's concerns to those of the lawyer. Similarly an expression of judgment by the lawyer ("I think you did the right thing") distorts the natural development of the story. It underscores that someone is sitting in judgment; the story shifts away from what the client feels to what he thinks the audience wants.

Active listening is a device which prevents you from jumping in and closing down the client's thought development with some silly question, compassionate judgment or even brilliant insight. It is hence akin to non-judgmental, non-directive, grunts, silences and comments such as "I see", "Tell me more", "Go ahead". What you do is simply reflect back what the client tells you. As Thomas Shaffer, in Legal Interviewing and Couseling, describes it, when the other person pauses, you say "You are saying THIS about THAT." Shaffer continues:

> Let him correct you if your reflection is wrong. Try to get into the feeling behind what he says--make that feeling your own--as the words themselves. And, try to make the words your own; reflect what he means, in your words.

Note how active listening differs from non-judgmental non-directive grunts, silences and brief encouragements. First, it forces you to actually listen. You must concentrate on what the person says. Your mind cannot drift to other matters. Second, active listening quickly builds rapport--it is overwhelming to be actually listened to. Third, it tends to encourage the client to get to the level of feelings. By reflecting back what you take the client to be feeling you are telling the client that it is proper to discuss feelings in a law office.

Ah, there's the rub.

Beginners are often uncomfortable with the concept of active listening. I think their resistance often stems from a fear of emotion. However, the mere expression of emotion does not necessarily lead to total breakdown and suicidal behavior. That you are not a psychiatrist does not mean you must "stick to the facts." There are emotional overtones to legal problems; they are often more important than facts. Let them come. It makes a world of difference if your client hates the opposition or if he is merely amused at their asinine shenanigans.

Allowing emotion in the law office often helps you pick up additional legal issues. The divorce client says, "I was a fool to put the car in her name." By pursuing this the lawyer may find simply spite; on the other hand, he may find cause to get the car back. People seldom feel mad or foolish without reason. Perhaps the reason will lead to legal redress. By shutting down the expression of emotions, by failing to pursue them, you may never learn the cold facts.

"Active listening" has other advantages:

It allows the lawyer to understand the client.

Like others, we quickly stereotype--the person across the desk quickly becomes "another divorce case" and we stop listening. By forcing yourself to "repeat back" you force yourself to listen.

And, active listening helps the client think out the problem because he hears what he is saying. Some clients seek legal help without a clear idea of what they would like to happen--they simply know they have a problem. In these situations, the client needs time and space to sort things out.

It allows the lawyer to get off the "not seat."

As problem-solvers we tend to panic when the client brings up a topic we haven't covered in some course--"How will I take care of the kids?" We think we must solve the problem if we acknowledge it; to avoid acknowledging it, we simply keep our head down and ask the next question. There is no rule that you must solve every problem your client mentions. But, when someone does bring up a problem, how can you respond to it without offering advice, without committing yourself to finding a resolution? By reflecting the problem back: "You are concerned about caring for the kids?" Active listening allows you to acknowledge the problem while not taking responsibility for its solution. Responsibility stays with the client.

E. Be non-judgmental

As silly as it may seem, you, by positioning yourself on the other side of the desk, have become "The Authority." Little does your client suspect that, in grade school, you were always the last one picked.

Expressing judgment shuts the client down. "You paid $1300 for a car that doesn't run?" Your client has good friends and relatives to tell him how stupid he is--he doesn't need you. Expression of your own prejudices and values will distort the client's story. Remember that he has a powerful incentive to conform to what he takes to be your expectations. Probably he does not want to be personally rejected. Additionally, he will tend to view your prejudices and values as "the law". ("Obviously the law won't help someone who gets taken buying a car; no need to tell him about the guarantee I got.")

Being non-judgmental does not mean being indifferent or expressing approval ("So you beat your kids" or "They clearly deserve it"). Both can indicate to the client either that you really don't understand his conflict or that you are not really concerned about it. An easy, assuring response often translates, "Go away, I'm not concerned."

Your attitude should be one of understanding interest, which is easier to describe than project. Your client should feel that you are willing to help him even if he has done something stupid or immoral in the past. You need not approve it, but you do not reject him because of it.

III. Getting the Trust

Realizing the importance of learning the truth, some beginners greet their clients by leaning across the desk, eye ball to eye ball, and calmly and quieting stating: "If I am to help you at all, I must know the complete truth." Glancing around the office, they softly whisper, "Everything you tell me is, of course, privileged."

"Oh, I see. But, I'm the telephone repairman."

Television has done bad things for our calling. Most clients want wills, not to confess to murder. The privilege bit is usually out of place. The "speech" also tends to raise anxieties, "He thinks I am going to lie to him." Fundamentally, however, the advice is usually in vain. If you are to learn the truth, it is not because of the privilege but because your client trusts you and believes you will help him. Without seeking any great psychological truths, usually a client will withhold facts for one of two reasons. He is either afraid he will look stupid if the truth is known or he is afraid that you will refuse to help him if you know all the facts, "If he knows I am guilty, he won't defend me." No clever cross-examination and no grave discussions of the attorney-client privilege will bring out the truth as long as the client fears it will hurt him more than it will help him.

So how to get "the truth"?

A. Your desire to win as a distorting influence

Many beginners simply want to win. They overlook the negative aspects of their client's cases. The desires of the lawyer and client dangerously merge. The client wants to tell a winning story. In almost all cases, he will be reluctant to disclose unfavorable material. In some cases, he will fudge truth and manufacture falsehood. Too often the client is aided and abetted in this by the lawyer. Wanting to hear a winning story, the lawyer, consciously or unconsciously, may lead the client to a more agreeable version of the facts. Even where the lawyer is not an active participant in this twisting of hostorical fact, the desire to win may well still his rescue of it. He will allow the client to stay at the level of vague generalities and conclusions rather than forcing him to deal at the level of inconvenient fact. When he sees a contradiction, the lawyer will brush it aside and quickly forget it rather than confronting the client.

To learn the truth from the client, it is of utmost importance to neutralize your own conteniousness. Put partisanship aside for the moment. Initially adopt the stance of a judge or reporter and concern yourself with "what happened." Become the advocate only after you have learned the basic facts; only then concern yourself with figuring out why the client should win no matter what happened. Expect a little rain. People will come to you generally because they have had a quarrel. Only in comic books and far away galaxies do the good and bad neatly divide for combat. In other words, you are well advised to suspect that the beautiful princess sitting across from you did something mean and petty which in turn aroused the forces of evil and darkness against her. (If the forces of evil and darkness are sitting across the desk, you are well advised to get your fee "up front".)

Now a few more words on the vices of leading, conclusionary discourse, and the failure to confront.

B. Avoid leading the client

Note how you ask question is very important:

"Robbie, I need to know exactly what the president of G.M. said to the president of Ford. Try to go back in your mind. You are standing there, they are talking. Tell me everything they said, even if you don't think is it important."

"Okay. What else was said?"

"Did they talk about charging the same prices?"

"Look, do you want to win this case or lose? If the guy from G.M. said, 'Let's get together on the matter of prices', you stand to win upwards of 320 million dollars. Now, what did he say?"

Occasionally, it will be impossible to objectively gather the facts. Truth is often elusive. Assume it is important whether the client was drunk at a particular point in time. As the degree of intoxication is not an objective fact, the client will honestly recall his state as more or less intoxicated depending on his perceived interest. In asking a client to relate the degree of intoxication, the lawyer cannot frame a neutral question--no matter how it is phrased, it will lead the client in one direction or the other. Try it. If the client is to be lead in any event, best to lead him in the right direction.

C. Deal in facts, not conclusions

Many beginners never get their client beyond a series of ultimate conclusions:

> "Before I shot, the victim was approaching me holding a meat axe in a threatening manner."

Only in appellate reports can such sloppiness be tolerated. Was the victim walking or running? How far was he when you first say him? When you fired? Where exactly were you standing and where was he? In which hand did he hold the meat axe? Was it raised or lowered? Which way was the blade pointing? Was anything said? Exactly what and at what point in time?

Inconvenient facts hide in vague conclusions.

If you are dealing with a case in which specific fact configurations are key--self-defense, misrepresentation, the intersection collision--take the necessay time to develop the facts. And it will take time. Probably the best way is to have the client relive the situation:

> "You have just entered the store. I want you to see yourself walking in. What did you do right after you went in? Tell me as much as possible."

D. Confront the client where appropriate--The other side will

How to probe without alienating the client? One device: "What does the other side say about this?" What if the client persists in an incredible story? It depends on your personality. If you do not like direct confrontation--"I don't believe you"--blame it on His Honor--"The Judge won't believe you." As developed in the chapters on problem solving and negotiation, it is absolutely essential for you to learn the unfavorable aspects of the case before being surprised by the other side.

IV. Giving Advice

The first impulse is that of all decent human beings--"Everything will work out fine." It is somewhat overpowering when a fellow human being suddenly treats you as a prophet. Many of your clients will be desperate and the urge to reassure them will be extremely strong. Be cautious. First, it may be that "everything will not be fine" and then you are in a fine kettle of fish. Second, your easy reassurances to a deparate client may indicate to him that you either don't understand the problem or don't care about it. Third, you may be creating a dependency relationship which, although flattering to you, does not advance the long-range interests of the client.

Make it clear that you are to help the client with his problem, but that you are not to assume total responsibility for its outcome. The client and the law are also responsible parties.

As to giving legal advice, only on rare occasions will you know enough law to give legal advice during the first interview. Some beginners feel that clients "expect" something profound at the end of the interview. Lord knows, that's what they wanted in law school. But don't be embarrassed into saying "something". Only on the rarest of occasions does a client suddenly rip off a fact mask, exposing the dreaded countenance of Law Professor Quibble Weaver.

Bad legal advice comes from the pressure to "say something." Good advice comes with reflection. Why not "This is an important case and I'm sure that you don't want something off the top of my head. I will have to do some research before I can fully advise you."

Related to this, actually read the documents your clients gives you. Again, resist the pressure to put them down and ask another question. "I want to read the complaint. It will take ten minutes. Why don't you get some coffee."

When you do give advice, be certain it's understood. We have developed a rather rarefied vocabulary. Few laymen really know, for example, if they want their fortune to past "per stirpes." Many beginners realize this and drop legal jargon when explaining things to their clients. Alas, then they talk like graduate students.

V. The Psychological Dimensions

Much of the advice so far as stemmed from an assessment of the psychological aspects of legal interviewing:

--Your desire to win causing you to lead your client and overlook the weaknesses in the case.

--Your desire to come across as a professional causing you talk rather than listen and to advice rather than reflect.

--The client's anxieties concerning the interview and his general legal position as triggering some routine remarks on your part.

--The client's reluctance to talk as requiring more than the whispered assurance that everything is privileged.

Many works on legal interviewing stress the deeper psychological aspects and talk of such things as "transference" and "Jungean Psychoanalysis." I recommend these works as giving you a fuller appreciation of the process. Here is something more "down home". Three topics: "Your client", "You", and "The Interview Dynamics".

A. Your client

Your client is more than a "torts" or "contracts" problem. Like you, he has occasional headaches, played dodgeball when he was young, and doesn't like thinking about getting old. Unfortunately many lawyers view themselves merely as technicians:

Question: "Mr. Jones, you told my secretary that you want a divorce. Is that correct?"

Answer: "Yes."

Question: "How long have you lived in this state?"

Answer: "Two years."

Question: "Do you want custody of the children?"

To help your client as a person, you must come to know him as a person. Consider not only the case but also the person. Before he opens your door, you can know quite a bit.

a. He is anxious enough about a problem to seek help. (Your anxiety in asking the right questions, in coming across professionally, is pale in comparison).

b. He has chosen to seek help from an attorney rather than someone else, i.e., a minister or relative. He has characterized his problem as legal, or seeks a legal solution. Perhaps he has sought help unsuccessfully from others.

c. He will have some emotional response to the fact that he is forced to seek aid--perhaps humiliation, perhaps anger.

Even before you meet your client, and continuing throughout your relationship, take an interest in him; ask yourself questions about him and his situation. By this I am not suggesting that you should become his psychological counselor or confessor. That role suggests substantial problems in terms of competence and client expectations. What I am suggesting is that the more you know about your client's total situation, the more likely you will be able to render effective legal assistance. And surely, if you realize that your divorce client, the person sitting on the other side of the desk, may very well be on the edge of despair, your first question will not be:

"How long have you lived in the state?"

B. You

Here simply the realization that you aren't as objective and cool headed as you think you are. We have already seen how your desire to win may skew the story you will hear. So too will your feelings about used car salesmen, welfare workers, smokers, people with gold teeth, liars and bleeding hearts. Realize that two lawyers can interview the same person and hear essentially different stories.

What can be done about this? First realize in the abstract that you have prejudices and blind spots which will affect how you define and solve your client's problem. Second, try to realize what these actually are. Become aware of your reactions to people and situations as you experience them. (How do I feel about this person? About this particular situation?) Ask yourself why you are reacting the way you are. (What is making me tense? Why am I suspicious of that person?). By questioning yourself you can discover your precise prejudices as they apply in a particular case. With this knowledge, hopefully you can correct for them. If you generally tend toward compromise, ask yourself in the particular case if you are sacrificing the client's economic or legal rights in the interests of reducing conflict. Again, if you realize your negative reactions to your client simply stem from his accent, try to pretend he talks like us "normal folk".

C. The interview dynamics

An interview is more than the transfer of information and advice. Fears and expectations, yours and the client's, are being reinforced or lessened. Both of you are forming opinions--is the lawyer someone I can trust? Will he withhold help if he knows the whole story? Is he concerned with my problem? Is the client telling me that truth? Am I creating a good impression? Is he the kind of person who will follow advice?

Be aware of developing and changing attitudes. Is the client expressing hostility? If so, what is the cause--fear of the legal process or embarrassment in seeking legal help? Does the client appear tense? If so, is it due to the nature of his problem or the nature of the interview? Does the client appear to be openly discussing the problem? Does he seem to understand what you are saying? Does he seem to accept or reject it?

The basic notion is to occasionally step back during the interview to see how it is going. The assumption is that you will learn something of your client, and of yourself, that you otherwise might not.

COUNSELING

I. The Client and Lawyer as Fellow Humans

Realize the humanness of your client. We lawyers tend toward the abstract. And that creates problems for our clients and for ourselves.

Candor forces the admission that much of the practice of law is routine and lacks intellectual challenge. Candor also forces the admission that we can delight in the discovery of our own cleverness only so many times. Even that becomes a bore. So what is to sustain you in your long years of practice? Money? Booze? More hopefully, a keen and lively interest in your clients and in the great and small dramas they bring to your office.

How to develop such an interest? Allow the client the richness and complexity of his humanity. Do not too quickly stuff him into the "torts" or "contract" bottle. Elsewhere in this book I have suggested some of the techniques. Be non-judgmental and allow emotions in your law office. Permit the client the time and space to think through his predicament; encourage him to break through his conclusionary grunts--"I hate the bastard, sue"--to reach the specific factual irritants. It is at this level that creative solutions will be found.

Using the techniques of professional counselors, such as "active listening", you will encourage your client to communicate his true fears and expectations. Not only does this allow you to better serve him, but it also makes him and his predicament more interesting, more compelling, more human. This is what gives you sustenance as you plow through those mountains of form books which constitute the practice of law.

In client counseling, you should also recognize your own humanness. In part, this will mean a realization that the model of the lawyer objectively presenting the client alternatives is flawed. Your own expectations, fears, and desires will skew the process. More of this later. Here the simple notion that, as you are human, you and what you do are quite important.

Lawyers, when thinking in terms of counseling, naturally turn to the literature of professional counselors-phychiatrists, psychologists, and social workers. While these professions have much to offer us, realize that the practice of law if fundamentally different. We are not mere listeners, we are actors. In the Chapter on ethics, you were warned of the danger of allowing your ethical being to fall in the name of "client loyalty". Here the threats are "nondirective couseling" and "client autonomy". You are a moral actor and are responsible. If your client wants you to do something you feel morally repugnant, assert your own humanness and object. If your client is about embark upon a foolish or unethical course, do not let the teachings of Carl Rogers hold your tongue. Ours is a different profession.

II. The Lawyer as Educator

In counseling, you are an educator, not a decision-maker. Your job is to present the alternatives and educate as to their ramifications. The client decides. A counseling session is successful to the degree that the client has increased his understanding of his predicament.

Two points concerning the role of educator. First, it is not enough to know only the "law". Often your client will have a problem that the law cannot solve or one that can be solved better elsewhere. Acquaint yourself with community resources--usually the United Way will have a booklet listing services available. The need to know community resources stems from viewing your client as a person rather than as a case. You have accomplished little if you limit your role to beating the marijuana charge when you know your client is experimenting with hard drugs. Unless you encourage the client to get help for this problem, likely your next contact with him will be in a felony holding tank.

The educator does more than present facts and expertise--in the legal context, the legal options available and the assessment of their likely outcomes. The educator has another extremely important function: in the words of the famous German sociologist, Max Weber, the job raising "inconvenient facts". To the traditional educator, this means raising the problems and pitfalls inherent in any belief system, in the case of a lawyer, those in any course of action available to the client. It is the role of the devil's advocate: you should force the client to consider the unpleasant side of his choices.

Often you will find yourself forced into the role of devil's advocate by your client's unrealistic assessment of his position. When you meet your first criminal defendant in the county jail, you are likely to be greeted with:

> "No sweat counselor. We'll beat this one. Why my cellmate tells me of this dude that beats up a cop and walks after three months's local time. And all I did was grab a purse. And not only that. The cops didn't give me my rights. That will spring me. Besides I want to sue."

Or your first personal injury client candidly confesses:

> "Even though it really hurt, considering the $100,000 I'm going to get, I'd stub my toe again."

There is an understandable tendency to beg off the role of devil's advocate. No one likes to rain on someone else's parade.

> "You're facing a serious charge. With your record, if convicted, you're facing probably a year. I don't care what your cellmate said. And the fact that the police didn't advise you of your rights doesn't mean a thing unless you confessed or made damaging admissions. Now, let's get down to cases."

> "People read a lot a crazy things about huge jury awards. The law is, however, if we can prove that your injury was caused by the other person, you will be entitled to the amount you were harmed. This will be up to the jury to decide, but it will be nowhere near as high as you seem to think."

When people come to you with a problem, your first instinct is to reassure them that everything will work out. But don't do this by agreeing with them that their situation is good. Reassure them by convincing them that, no matter how difficult their problem, you will do your best to help.

Let us now shift to the problem of counseling the client as to a given course of action. Your job is to force the client to appreciate all of the implications and inconvenient facts involved. What are they? Binder and Price, in their fine book Legal Interviewing and Counseling: A Client-Centered Approach, point out that each major legal decision (to plea, to settle, to litigate) may have implications in at least four areas.

1. Legal.
2. Economic.
3. Psychological.
4. Social.

As Binder and Price suggest, approach client counseling with this scheme in mind. Before the counseling session, write the four areas of concern on a piece of paper and, under each category, list the relevant concerns. Much of this work you will have already done in your initial evaluation of the case. In the Chapter on Negotiation, you were urged to consider collateral factors which will affect the worth of a case--the costs and ordeal of trial, the effect of publicity, the "risk" factor in litigation, the importance your client or his opponent attaches to the vindication of certain principles. These considerations now convert into the four-part counseling scheme. Your evaluation of the case also focused on the question likely to be paramount to the client in the counseling session: "If we fight, what are my changes?" On how to make these assessments, again consult the Chapter on Negotiation.

Go over the list with the client. Obviously, he will have much to add by way of specific points to consider. It is his psychological state, after all. Recall, however, your devil advocate role: clients will often overlook the unpleasant: "How will you feel in three months about settling? Might you regret it?"

Listing by category provides both you and the client a way of approaching the decision-making problem. After complete listing and thoughtful discussion it is the client's decision.

Often the client will want you to make the decision. In some situations, this is proper. For example, a busy business person may not wish to expend the necessary time and delegates the matter to you. In other situations, however, the client will want you to decide because of his own insecurities and inability to take responsibility. Be warned: these are often the same clients who will be dissatisfied with any decision; best if they cannot blame you. Do what you can to keep the ball in their court:

> "Look, it isn't me. I'm not the one who was in the accident. I'm not the one who will wake up three months from now and wonder whether I would have done better by going to trial. You're the one and it's your decision."

Despite such ploys, some clients will continue in their refusal to decide. In that case, as not to decide is to decide, you might as well. Perhaps it would be well to dictate a memo, for the client's signature, reciting your repeated efforts to secure a decision from the client. It will help when the client storms into your office, three months later.

A final word concerning the lawyer as educator analogy. To the teacher, the commandment: "Teach, don't preach". Present "facts", don't preach ideology or belief systems. The student autonomy model, however, is faulty. Facts are not value neutral. In teaching "facts" one must select and emphasize and in doing so one is preaching a certain way of viewing reality, in other words, a certain ideology. Jerome Bruner, the noted educator, points out that education is a powerful agent of control as it shapes people's concept of the world and, once this is done, "we can safely leave their actions to them--in the sense that, if they believe themselves standing before a precipice, they will not step over unless they intend suicide." (Bruner, On Knowing, Essays for the Left Hand, Harvard University Press, 1962.)

So too with client autonomy. The possibilities for manipulation are great. The way alternatives are presented are likely to determine the outcome. The manipulation is often unconscious. Does your assessment that his chances are "good" spring from your desire to gain trial experience, to punish the opposing lawyer, to impress your superior? And to what degree does your assessment of the client's situation turn on vague unverified feelings you have on such matters as what it is like to be in jail, to be in an automobile accident, to testify at a trial? Probably a great deal.

To save client autonomy, you must do more than simply allow the client the final Yes or No--"Now, you're sure this is what you want, isn't it?" First, become consciously aware of your own feelings. Ask what would you decide if you were the client. This will force you to realize your own preference. And then raise the "inconvenient fact" on yourself: Why did you decide the way you did? Second, attempt to rest your assessments on facts, not on vague feelings. For example, the probation department wants to send your client to a "Boy's Camp". Don't rest your assessment of this turn on whether you saw a "boys camp" as presented by Disney or one starring Cagney. Instead, visit the place.

The final method of protecting the goal of client autonomy is to be committed to it. It is not self-evident. After all, you have spent three years, and tough years at that, being trained to balance, to weigh, to decide. And, now someone is attempting to convince you that some plumber can make better decisions than you. Why, he didn't even get into college, much less law school.

The rationale goes to the matter of competence. Take a case from medicine. The patient has cancer and the doctors say that without extensive surgery there is a 90 percent chance that the patient will be dead within the year. The patient declines surgery, pointing to its cost and pain. The patient further states a desire for a natural, dignified death. Perhaps we would choose differently. But we don't face the dilemma. The value we attach to the various factors is different from that attached by the patient. Had we lived the patient's life, we would know his experiences with pain, money and death. Knowing them, we would likely choose as he did; we must respect his decision if we are to respect our own.

A few more words by way of sermon. The person sitting across from you is not a law school exam, something to be solved cleverly by some third person's criteria. Help the client solve his problem, for his benefit, not for yours. The client, not you, lives with the decision. Remember, it is the client's case, probably his only case.

Who knows? You may get another client.

LEGAL INTERVIEWING AND COUNSELING: COMMUNICATION AS PROCESS

David B. Hingstman

At the outset, I must confess to a conflict of interest that you may use to disqualify my attempt to speak for the communication profession. Before arriving at Northwestern University, I labored for two years as a neophyte lawyer for a large "Wall Street" firm in New York City. Although young lawyers at such firms are seldom trusted to do what most attorneys think of as "interviewing and counseling," it might be said that my perceptions of the ways in which other lawyers did them have destroyed my objectivity, my scholarly detachment. Even more damning, the audience at this conference may be denied the spectacle of a pragmatic attorney and an idealistic communication theorist at loggerheads over mutual misunderstandings.

Rather than following my lawyerly instincts to deny that the conflict of interest exists, I am swayed by my rhetorical instincts to persuade you that the conflict of interest is, in fact, beneficial. For I believe that much of what the communication profession has to offer attorneys in the way of advice and research capability lies in making existing prescriptions for legal interviewing and counseling conform more closely to the realities of the situation that faces both lawyers and clients. Implicit in this view is the idea the communication between lawyer and client affects and is affected by their personalities and the working environment. Our profession would criticize strategies of interviewing and counseling that fail, in one way or another, to account for these interactions. On behalf of the communication profession, then, I will critique present views of what lawyers should be doing when they interview or counsel clients. On behalf of the legal profession, I will ask what the communication view would do differently. Through the exercise of my dual roles and with good fortune, I may be able to piece together a "communication expert's" model for legal interviewing and counseling.

A CRITIQUE OF TRADITIONAL PSYCHOLOGICAL THEORIES

As you probably gathered from the preceding presentations on this program, the world is hardly clamoring for a new theory of legal interviewing and counseling. The explosion of interest by legal educators in developing clinical law curricula has triggered a flood of articles and books on these subjects within the legal publishing field. These publications vary considerably in the force and source of their recommendations.

Some are very down-to-earth and practical in their tone, promising the reader only the essential strategies gleaned from years of hard-earned experience by legal professionals.[1] Others apply theories of human personality abducted from the cognate fields of motivational psychology,[2] Freudian psychotherapy,[3] and even Lewinian field theory.[4] These readings place more of a demand upon the reader to make connections between the abstract principles and the concrete strategies. Although a member of the communication profession should blush at the thought of criticizing others for taking leads from psychology, discussion of the appropriateness of a particular theory to the analysis of the problems involved in interviewing and counseling is scarce. Perhaps discourse on these subjects among legal scholars has not reached the winnowing-out point where writers feel it worthwhile to argue the merits of the underlying theories. In any event, these diverse theories share a common orientation that is deserving of closer examination. They all tell the lawyer what (s)he should be doing for (and to) the client and cite disapprovingly examples of deviations from the ideal.

One is struck almost immediately by the schizophrenic views these theories hold about human nature (to borrow from Freud again). The two parts of the syndrome may be labelled "lawyer" and "client." In most of these surveys, the "client" is an irrational bundle of needs to be gratified and fears to be purged. If the lawyer could only discover what deep-seated drives or repressed desires are controlling the client's behavior, (s)he can channel these impulses in a direction that makes the lawyer's job of legal analysis easier and that allows the lawyer to ease the traumas of the client as well. As an overwrought person, the client cannot be trusted to provide an objective version of the relevant facts in the situation. The lawyer must filter what (s)he hears through several perceptual screens. It is not surprising, I think, that the paradigm case for legal interviewing and counseling among these theorists is the prospective divorce client.

The other persona in this inner drama is the "lawyer." The lawyer has all of the best qualities of the professional thinker and therapist rolled into one. (S)he is single-mindedly devoted to the realistic pursuit of the client's interests, whether that means legal action or some non-legal solution to the client's problem. While interviewing a client, the lawyer should have no difficulty detecting and channeling the irrationality of the client's ideas back toward reality.[5] Unlike the client, the lawyer can always be counted on to exercise reasoned judgment untainted by interference from irrational impulses. Any drives or desires have been suppressed for the duration of the interview or counseling period.

But the lawyer is more than just a rational person. (S)he is also an understanding therapist. Although the attorney is not expected to arrive at a counseling session with small notepad, pencil, and empty couch at hand, (s)he is expected to react unemotionally to the psychological whorls and eddies of the client's persona. One skill of the lawyer/therapist is the ability to collect enormous amounts of information about the client's state of mind from observation of behavior as well as the understanding of all of the psychological implications of the legal framework as the client perceives them.[6] This is not the garden variety of interpersonal perception. Perhaps law students can be required to obtain joint degrees in psychology, as some scholars have hinted. But even such learning does not get the lawyer through particular interviewing and counseling sessions. (S)he must be capable of a level of insight fully equal to that of the best psychoanalyst. Goodpaster gives a thorough description of what the lawyer must bring to the setting:

> "These observations have significant implications for the training of attorneys. They suggest that to be effective, at least in dealing with others, attorneys must be subtly trained to recognize emotion and to draw reasonable inferences about its meaning as it appears in given contexts. At the same time, the attorney has to have the ability to assess his own psychological impact upon those with whom he is dealing: He must have a sophisticated awareness of the nature of human influence processes. He must be able to interact with others while at the same time being aware of the psychological effects of the interaction process, both on other and on himself."[7]

This is a tall order. If the expert in legal interviewing and counseling invokes this formulation rigorously (rather than exhortatively), lawyers must analyze themselves and their clients, while maintaining a metatheoretical position on the process of interaction as a whole.

Consider for a moment a composite picture of the "lawyer's" persona. This lawyer keeps a neat desk, for a sloppy desk can only mean a sloppy mind fraught with emotional perils. This lawyer handles only one client at a time, or at least is able to block out thoughts about other matters while dealing with a particular client's business. This lawyer doesn't mix thoughts with emotional concerns about personal matters while on the job. This lawyer doesn't let her feelings about the client as a person interfere with the working relationship and the reasonableness of her statements, decisions and actions during interviews and counseling. This lawyer, in short, would never need a lawyer.

Compare this image with the reluctant testimony of a partner in practice at a firm in New York City. His opinions were solicited by a new professional gossip sheet:

> "The best lawyers I've seen are the ones who deal well with chaos, who thrive on ambiguity. Things swirl around their desks in great disarray: The deal is aborting -- no one's reachable by phone -- the wife calls with scary news about the kid's fever -- the secretary needs to leave early -- and the lawyer is handling it. He hasn't panicked; he's not screaming; he refuses to get side-tracked by trivial concerns.
>
> I can do that some days. But there are other days when the frustrations seem to overwhelm my capacity to function. Item piles on item; the phone never stops; you put out one fire and two more are lit; everyone you don't want to talk to wants to speak with you at length, while everyone you want to talk to is out; and you wonder why you didn't opt for optometry."[8]

The problems faced by this practitioner would seem to leave him in a psychological state closer to that of the "client" persona than that of the "lawyer." Even if the state of mind represented by the "lawyer" persona is one that can be assumed under the best conditions, it is unlikely to be available to the attorney under the conditions outlined above. My own experience fell far more often in the frustration category than in the mode of fresh exciting opportunity. An attorney who does not share these kinds of experience probably does not make very much money.

How do we account for the schizophrenia of many of the psychological theories of legal interviewing and counseling? We might be tempted initially to invoke the old adage "Physician, heal thyself." But the question has more complexities than a one-sentence challenge can muster. It has something to do with the passage between diagnosis (explanation) and advice (evaluation) in those theories and the epistemological assumptions that must be made to persuade others of their usefulness.

The "client" persona emphasizes the explanatory power of subconscious desires and needs in dealing with deviations in behavior from what we see as "normal" or "rational." But these desires and needs must not be so powerful as to impede the person who acts upon the client to bypass or treat the conditions that produce the unexpected behavior. When the discussion shifts from the problems of the client to the responsibilities of the lawyer, the view of human nature also shifts from the boiling kettle of desires emitting occasional whiffs of rationality to the cool cup of reason from which emotions will settle or be strained out. If attorneys could not claim this presumption of reasonableness, there would be little use for a theory that puts all of its apples in the basket marked "a better frame of mind" as the best way to improve communication with clients.

The lawyer persona, then, is a confidence-building device. After warning the attorney about the possibly bizarre behavior of some clients and the stubbornness of the drives that impel it, the psychological theorist reassures the attorney that (s)he is of sound mind and merely requires the occasional guiding light of self-knowledge or professional role to gain control of interactions with clients. The turn from irrational client to rational lawyer enables the lawyer to believe that conscious effort to discover and control drives, whether in oneself or in others, can allow a person to achieve a particular state of mind. By invoking that state of mind before discourse, the lawyer gains a tool for combing more facts out of a discussion and building confidence and repose within the client. For all of that, nevertheless, the curve between client and lawyer personas is tight. Psychological theorists must present some art that justifies the claim to the lawyer persona. This "art" becomes the pattern for the theorist's recommendations in interviewing and counseling. Consider some of the means by which these theories negotiate the turn and answer the lawyer's nagging doubts.

The most common of the steering mechanisms may be the penetrating light of self-understanding. Irrational drives and desires may be most effective in controlling behavior when they remain unconscious. To gain control over these drives and desires, the individual must allow the unconscious mental activity to enter the realm of the conscious. Once there, the unconscious thoughts can be analyzed to recover attitudes and feelings that have been suppressed. If this notion sounds familiar, it should -- it is the technique of psychoanalysis. Several aspects of the technique show up in the literature of legal interviewing and counseling. Some applications of it are so straightforward that they seem to have been composed by crossing out the words "therapist" and "patient" in other articles and inserting "lawyer" and "client."[9]

The lawyer's first step toward self-understanding is to acknowledge the existence of unconscious reactions toward clients. In doing so, the lawyer takes a risk because of the psychological defense mechanisms that repress awareness of those urges. By reflecting on past behavior and feelings and by observing her own reactions in role-playing, she can become sensitive to biases and self-distortions. Eventually, the knowledge gained through these methods can permit the lawyer to anticipate and alter inappropriate responses to client statements and actions.[10] The lawyer may be so successful in detaching evaluation of behavior from the control of unconscious drives that (s)he will notice the development of emotional reactions during the interaction itself. Detachment permits both the assessment of the justification of such reactions and the reduction of the intensity of the emotions.[11] What does the lawyer do if (s)he continues to be unsuccessful in achieving detachment? Go see a better therapist![12]

In the second stage, the lawyer applies what (s)he has learned about her own psychodynamics to the understanding and analysis of the client's unconscious drives. The interview and counseling sessions offer the perfect setting to help the client remove psychological blockages to the disclosure and realization of the client's interests. As Watson argues,

> "/i/n my experience of working with and observing lawyer-interviewers, it has seemed that the single most important error they make is to fail to try to understand why the client is engaged in the struggle which brings him to counsel's office. This 'diagnostic' mind-set is often crucial to the selection of a strategy which will effectively serve the client."[13]

In this piece of advice is buried the notion that a client must be undergoing some type of psychological struggle if (s)he is consulting an attorney.

Lawyers should use the interview to accomplish the following tasks: overcoming resistances to disclosure, discovering the emotional and motivational factors underlying the client's problem, and utilizing the occurrence of transference and countertransference of perceived qualities between lawyer and client to move toward open, helping relationships.[14] The counseling procedure represents an extension of the psychological goals of the interview for the lawyer; ". . . to describe a counselling process meticulously would bring us very close to a study of the psychotherapeutic process."[15] Rather than using his knowledge about resistances, drives and transferences passively to enrich the yield from the interview, the counselor lawyer intervenes actively with the help of these principles to direct the client toward the relief of the client's internal struggle.

In the psychoanalytic perspective on legal interviewing and counseling, the mere cultivation of self-awareness is enough to produce a chain of events that allows the lawyer to control her own instincts that interfere with the goal of assisting the client and to discover the means of releasing the barriers within the client's personality to the rational resolution of the client's legal difficulties. Notice that one consequence of the growth of self-understanding is the legitimation of the claim to the lawyer's persona. The attorney moves away from the client's persona when self-recognition leads to self-control and then to understanding of the other's subjectivity. Notice as well that the definition of a "legal problem" is grounded in the nature of the client's persona. Some situations frustrate the attainment of a desire because they trigger psychological defense mechanisms that unconsciously inhibit the client from finding a solution. The work of the lawyer is to adapt legal methods to the removal of these blockages.

Could anyone object to this characterization of the lawyer's task? Our harried attorney might have a few qualms about this approach. One would be that the psychological training involved exceeds the capacities of the attorney. No law student or legal associate could be expected to master and renew acquaintance with legal principles and the subtleties of Freudian psychology. Nor is there time to go through extensive self-analysis. The theory does not tell us how much the lawyer must know before he truthfully can be said to be helpful to himself and to his client. It may be that in this case a little knowledge is a dangerous thing. The attorney may develop misconceptions that twist his interactions with clients.

Perhaps a more vigorous challenge would be issued when the busy attorney reminded us that the exigencies of the particular situation in which the attorney finds herself interviewing or counseling a client may break down the fine structure of psychotherapeutic awareness. One of the virtues of psychoanalysis is that the psychiatrist can develop through contemplation over time a complex picture of the therapist's and the patient's psychological makeup. That is the psychiatrist's job. But studies of helping behavior by lawyers have shown that the conditions under which therapeutic relationships can arise with clients are far more adverse.[16] Interruptions by phone calls, other attorneys, and other clients could destroy the fragile psychoanalytic signals that the attorney seeks to detect. Irritants in the setting could also destroy the detachment that permits the attorney to evaluate and control her own behavior. In general, the psychoanalytic model's emphasis upon the internal aspects of human motivation neglects the disruptive effects of the environment upon behavioral intentions. Once again, there is no guarantee that a partially successful effort at psychological awareness will benefit the attorney or the client.

Our attorney demands one final word. Suppose that the lawyer's clients do not fit comfortably within the "client" persona. What does psychoanalytic awareness have to offer in this case? Surely it is unrealistic to claim that all legal problems can be attributed to frustrations of an internal drive state by a defense mechanism. The pervasive influence of society and the environment upon our affairs can lead to situations where, through no fault of our own, our expectations within some relationship are violated in a way that the law can redress. A lender, for example, may find that a debtor has skipped town. Or a pedestrian may be run down by a negligent cabdriver. Although it is possible to reformulate these problems so that they reflect the interaction of unconscious desires and defense mechanisms, such a characterization does nothing to improve the lawyer's understanding of how to conduct interview or counseling for such clients. Indeed, modifications in procedure that reflect this interpretation of the client's motives may reduce the attorney's effectiveness if the client perceives the attorney as unrealistic or manipulative. The psychoanalytic method may be useful when the client is known to be involved in a situation laden with stress, such as divorce or a major crime. But its application beyond these settings can be called into question.

We have surveyed some of the weaknesses of the psychoanalytic view of counseling and interviewing. Perhaps in response to these problems, other psychological theorists who wish to retain the focus on state of mind strike out in a different direction. They avoid as much as possible any discussion of "deep" psychological conflicts as the genesis of unusual behavior. Rather, they employ motivational psychology, which describes a group of drives or needs that are inferred from observed patterns of behavior in the aggregate. People act or refrain from acting to fulfill these needs. For the lawyer, the client's needs are the direct consequence of the reasons for which legal assistance is sought. By taking inventory and molding procedures accordingly, the lawyer can bend the client's behavior toward congruency between the client's needs and the tools available to the lawyer. If the client must rebuild self-esteem after damage from another's defamatory comments, for example, the lawyer can put this knowledge to good use in reassuring the client about the basic soundness of her character and perhaps convince her of the boost to self-esteem that would be more likely to follow from a retraction than from a messy and costly lawsuit.

The motivational model disclaims the charge of schizophrenia in a way different from that of the psychoanalytic view. It says that the difference between client and lawyer in needs and goals has nothing to do with comparative rationality or irrationality. Indeed, the whole idea that someone would label the choice of ends by a person as "rational" or "irrational" is preposterous, because the person does not choose needs and drives. Rather, our ends are formed within the framework of our social roles through which we fulfill our needs and drives. The lawyer's ends, then, are not those of the client because their social roles are distinct. The lawyer's role is to help the client realize ends through rational (legal) means. This is how these theorists define rational behavior:

> "People behave 'rationally' if they follow the probabilities as they see them by considering the consequences of alternative actions, establishing a preferential order for those consequences, and choosing the course of action most likely to lead to the preferred consequences."[17]

To protect the client's interests, the lawyer must understand the relationship between needs and role perspectives and advise the client about the available means for fulfilling needs through the legal system or about the likelihood that certain consequences will ensue from particular courses of action.[18] In sum, the "lawyer" and "client" personas in this theory are nothing more than a useful device for dividing up roles and extablishing the responsibilities of the lawyer. They are descriptive rather than normative tools, training models instead of medical diagnoses for self-analysis.

How does the attorney figure out what the client's needs and drives are? The lawyer's goal within the professional role is to get the client to participate in the interviews and counseling sessions. The relevant question, then, is clear: What motivates clients to participate in or withdraw from these encounters?[19] Binder and Price assembled a list of seven factors inhibiting participation (ego threat, core threat, role expectations, etiquette barrier, trauma, perceived irrelevancy, and need to talk about other subjects) and five factors facilitating participation (empathetic understanding, fulfillment of expectations, recognition, altruism, and extrinsic rewards). The lawyer should either overcome or introduce these factors into the interview or counseling session to stimulate maximum participation by the client.[20]

What happens if the client has conflicting needs? These conflicts can be expected. Indeed, those theorists who employ Lewinian field theory to describe motivation see the behavior of the person as the result of a dynamic equilibrium between competing psychological forces that can be added, removed, realigned, strengthened or weakened by external events or agents. ". . . /I/t may be said that lawyers get things done in their interactions with others by changing the psychological forces in the field of the person with whom they are interacting."[21] In essence, the lawyer must manage the client's needs, assisting the client in ordering them according to a hierarchy that permits maximum achievement of goals within a legal framework.

Some clients might breathe a sigh of relief if they knew that their attorneys were taking their cues from the advice of the motivational theorists. They could be sure that their counsel would not treat every conversation over problems as an occasion for psychoanalytic manipulation. Moreover, the client would be assured that the lawyer would do whatever was necessary to meet the client's needs, single-mindedly discovering, presenting, and evaluating alternative methods of achieving the client's ends. The lawyer's job when interviewing or counseling clients is to mold questions or advice so that the means available through the legal system can be congruent with the needs of the client. If an uncle can't decide whether to give his nephew a lump-sum gift, ask the questions needed to determine their tax statuses and convince the client that tax considerations should be the deciding factor. If a corporate vice president wants to get rid of plant wastes at least cost to the company, advise the client to dump it on a parcel of land owned by the company and then give the property away to the town a few years later for a charitable tax writeoff. If a government official is plagued by whistleblowers who are leaking information, recommend a rule that all employees sign secrecy agreements and take monthly polygraph examinations. . . .

Wait! Isn't there something not quite right here? The more idealistic among us might object that in glorifying a state of mind that looks only for means and neglects consideration of ends, the motivational theory counsels the attorney to ignore most of what passes for ethical responsibility within the legal profession. That is not to say that much of the Code of Professional Responsibility as interpreted by some expert commentators avoids a similar result. But even the Code leaves open some areas where lawyers are to decide for themselves whether to acquiesce in or oppose a client's ends, to differentiate between legitimate needs and socially irresponsible whims. And there may be many more subtle examples of interplay between means and ends than the ones I have recounted. The implication of the motivational theory is that time spent on these decisions in preparation for interviewing and counseling is wasted.

Proponents of the motivational view might respond immediately that making such ethical decisions is part of the lawyer's role, so that they would be incorporated naturally into the technique that the attorney uses to sift through alternatives and to formulate interview questions and counseling advice. Now we have reached the core of the defense of the attorney's role within the motivational view. The lawyer's motivation to act is assured within the social role. But instead of resolving the dispute, this move merely focuses more attention on the concept of "role."

By implicitly specifying what lies within a lawyer's "role" to ground itself, the motivational theory backs itself into an uncomfortable pedagogical corner. To be useful as an instrument for the improvement of interviews and counseling sessions, the theory must yield an unambiguous set of actions that the attorney should take to achieve the proper frame of mind. An unambiguous set of actions, in turn, requires a fairly simple description of the lawyer's role, or the attorney will give up in a frenzy over role confusion. But the simpler the role description, the greater the likelihood that an attorney will latch onto the simplistic definition in lieu of a richer specification of roles and responsibilities. This is particularly dangerous if the direction in which the abstracted role definition moves is one that exacerbates a weakness that already exists within the profession. Pragmatism and ethics come in conflict within the application of motivational theory to interviewing and counseling, and there is no assurance that the attorney will find the proper balance. Means-oriented theories of legal practice can have odious consequences when they sway the opportunistic person.

But our busy attorney wants another chance to speak. (S)he complains that (s)he can't figure out what her role is, because every time (s)he thinks (s)he has it pinned down, something comes along and lets it slip away. That "something" is the personality of the lawyer, the discordant expectations of clients and others, and the constant bombardment of stimuli from the working environment. Let us call them doubt, double exposure, and distraction. All of the big three Ds keep pushing the attorney out of the prepackaged role model of the motivational view. But awareness of the three Ds is critical in the attorney's decision about how to practice law.

Doubt arises when the lawyer has trouble coordinating his individual personality with the requirements of the social roles that the lawyer must play. Lawyers vary tremendously in the degree to which their personalities are congruent with those roles. As James Elkins has suggested,

> "/t/here is a dimension to each individual lawyer that cannot be defined by societal expectations which roughly define the legal role. To locate the individual within the legal role, one must look beyond the 'fit' of the mask; one must move inside. Within, one encounters the individual's self-identity--the psychological orientation to role. One may find that the lawyer identifies with his social role as lawyer or perhaps that he has simply adopted a temporary orientation in the world, playing out the legal persona for a fee."[22]

The motivational approach has difficulties reaching the individual who may experience the pressures of many different roles. Suppose, for example, an attorney feels shy when the client expects aggressiveness. What should the attorney do? Binder and Price fall back on the psychoanalytic model of self-awareness to handle this problem for some cases. But they conclude that no amount of self-awareness will allow the lawyer to work effectively with all clients.[23] Does this mean that the attorney should give up representing such clients? If you are employed by a large law firm, this course may be impossible. Binder and Price hedge a bit by arguing that if the lawyer follows their advice of learning the participation facilitators and inhibitors and of relating to clients in an open and supportive manner, "adequate rapport" will be maintained "with most clients."[24] But they do not speculate on what lawyers should do if their personalities hinder them from learning one or all of these skills.

Clients often expect the attorney to play many more roles than (s)he could have imagined on graduation day. In addition to ministering to their legal problems, some clients demand that attorneys do errands, get jobs for their children, entertain them at expensive restaurants during business deals, proofread documents, be on call at all hours, play mathematician, give business advice and comfort them in adversity (hence the therapist role!). Sometimes lawyers enjoy playing these other roles, but often they come at the most inconvenient times, such as the day before a long-postponed vacation or in the middle of lunch. And whatever needs to be done should have been done yesterday. It is these kinds of expectations that led senior associates in one large firm to coin a new proverb: if you want more client contact, you must not have contacted many clients.

Does the motivational theory give guidance on what to do in these situations? Say no because the lawyer's role is to inform the client of her legal alternatives only? Say yes because the lawyer's role is to do whatever is necessary to pursue the client's interest? The answer to this question has very little to do with the client's motivation and a lot to do with on-going communication and relationships between the attorney and the client. Try as (s)he might, the attorney cannot channel all of the client's demands into an orderly flow of lawyer-like assignments through the clever manipulation of motivation. When clients are relieved of responsibility for cooperation within the attorney-client relationship, the faithful means-seeking attorney can be mistreated.

The working environment plays strange tricks on the attorney's sense of social role through the distractions it creates. The idea of getting yourself prepared to assess a client's motives and present a laundry list of alternatives that respond to those motivations fades when you are trying to juggle six or seven deals or cases at once. Some years ago Cyert and March in their work on the dynamics of organizations[25] made an unusual discovery -- businessmen do not carry out their classical economic role as pure profit-maximizers. Instead they satisfice -- do what is necessary to reach a satisfactory outcome along several parameters and within the constraints of time and information costs. I have always thought this to be a good description of what successful attorneys do. But the motivational theorists by implication find this outcome unacceptable. They want us to be true to a single role, even if the information costs of such purity are very high.

It is time to review what the motivational theorists have accomplished in their effort to justify the psychological distance between the personas of lawyer and client. In their eyes, the distinction is one that is ideally suited to meeting the needs and drives of both parties. The client has certain ends that motivate her to seek an interview or counsel, but does not know the means of achieving those ends and the legal consequences of choosing among alternative means. The client's role, then, is to come to the attorney, present the facts and the ends, and participate in the formulation and evaluation of alternative means in the interview or counseling session. The lawyer is motivated by his role as lawyer to do or to determine what is the best way of pursuing the client's interests. He applies his knowledge of the law and of the client's motivations to select alternatives and help organize the client's conflicting secondary desires in a way that maximizes the chances of achieving the client's primary ends. The lawyer has no relevant ends of his own other than these. He does not question the wisdom of the client's ends.

The simile of client as bundle of desires and lawyer as genie runs into trouble, as we have seen, when ethical dilemmas, attorney personalities, client expectations, and the working environment play havoc with the pedagogically simple "role" models that justify the dual personas. Too many attorneys face problems in practice that cause them to fall far short of the ideal "client-centered approach" to interviewing and counseling and to despair of ever improving in this respect. But it is hard to blame them for their "uniqueness." There may be some attorneys who have reached the stage in their careers that they have complete control over their client's demands (say, a senior partner at a large firm and whose brother is president of one of the firm's major clients) or who have so few clients that each new client brings in work to which the lawyer can devote her full undivided attention. Unfortunately, they are the attorneys who are either the least likely to need or the least likely to read the advice that the motivation theorists want to give them.

COMMUNICATION AS PROCESS AND COMMUNICATION STRATEGIES

In a sense, I have been unfair to the psychological theories that sensitize the attorney to problems (s)he can expect to encounter when (s)he interviews and counsels clients. No model of relationships between human action and human mental processes can be expected to be perfect. Simplified constructions that emphasize certain elements of possible relationships, such as inner psychic conflict or motivations to fulfill needs, serve a heuristic function in the social sciences. They cut through the complexities and seeming randomness of much human behavior to highlight portions of social interaction that seem subject to explanation, prediction and control by those who know. If someone wants a higher degree of sophistication, (s)he can drop the assumptions of the theory one-by-one, test the resulting new hypotheses and issue qualifications to the original theory if the data support a revision. The fact that this process goes on continuously in psychological research does not undermine the usefulness of the original theory as a touchstone for organizing and defending a professional program of study in this area.

To reject the theory because the assumptions seem too simple may be to exalt form over substance, to throw the baby out with the bathwater. Academic carping of this sort often loses its bite when confronted with a single devastating question: What's your alternative? Most attorneys, perhaps reflecting a prevalent human weakness, would rather take a chance on a theory offering them some hope of greater control over their interactions with clients than stab blindly for an appropriate style of interviewing and counseling. Psychological theories hold out these hopes.

In another sense, I have been just in my criticism of the psychological theories. Lawyers would not have to pack their bags and give up their practice if all of the books and articles setting forth the psychology of lawyer-client interaction burned tonight. Nor would attorneys be reduced to silence (as are some method actors) if they could not understand the motivations of the client for coming to their offices. Much of what passes for specific advice in these texts is reorganized common sense that lawyers pick up from experience in communicating with other people either before or after law school. Science follows art in legal interviewing and counseling. But what energizes this science, what makes people sit up and take notice, is the direction or emphasis supplied by the theory which allows the reader to sort out various techniques according to some criteria of effectiveness.

Here the direction or emphasis is upon the techniques for controlling the development of a human interaction -- steeling the mind to influence discourse. Effectiveness is measured by the degree of control that the attorney can exercise over the situation by using the technique. There are telltale signs of the influence of psychological theories in this field that appear even when the author does not acknowledge his sources explicitly. The psychoanalytic theories tell the attorney to develop those techniques which allow him to apply what he knows about the inner conflicts of both lawyer and client to the formulation of questions and advice. Their favorite devices are interpretation of client behavior and manipulation of transference and countertransference. The motivational theory suggests that the attorney should adopt methods that determine client needs and desires and mold questions and advice to match the ends of the attorney (full participation in interviews, legal resolution of problems, etc.) with those needs and desires. It stresses active listening, open-ended questions, gamesmanship in structuring the interview, thorough assessment of alternatives and their consequences, and firm direction of hesitant clients.

Each approach emphasizes that the attorney can improve interaction with clients by striving to achieve a certain state of mind (self-awareness or client-centered motive-and-means calculations) that promises control over otherwise messy conversations with others. Control, then, is predicated upon a kind of comparative or relative rationality[26] residing in the person of the attorney. It is a form of higher-level insight that keeps the lawyer a few steps ahead of the client. This helps to explain why the theories must exaggerate the rational/irrational qualities of the "lawyer" and "client" personas. The epistemological assumptions underlying the distinction describe the best path for the lawyer to cultivate the ability and willingness to control and what that control looks like in practice.

Earlier in this essay, I speculated that the lawyer's persona was a confidence-building device for psychological theories. It persuades the attorney that conscious effort can bring about changes in her state of mind, changes that can be applied in almost any situation of client/professional interaction. All of this occurs even though attorneys as persons are heir to the same psychological weaknesses that afflict the ordinary run of people who trudge into the office. Now the relationship between the rhetorical persona and the applied science of interviewing and counseling may be clearer. In essence, the psychological theorists are saying that the attorney must be "psyched into" the belief that (s)he can and must control the situation by virtue of superior insight or professional role. Unless the attorney makes the leap of faith, (s)he will be buffeted by the same psychic winds or whims that make life so difficult for the client. There can be no control without confidence; state of mind determines the success of attorney-client communication.

The picture of an attorney preparing mentally to seize control over an interaction is a powerful image. Yet the photograph also discloses the shadows surrounding the theory. Who or what casts the shadows? As we have seen them, they are doubt, distraction, and double exposure. Doubt because the "irrational" qualities of the attorney's character continue to influence communication even when self-awareness seems to have purged the attorney's soul of non-therapeutic feelings. These interruptions aggravate any skepticism that the attorney may have about his powers to control an interaction by force of mind. Distraction from the working environment disrupts the mental effort to control the interaction by breaking down concentration and inducing forgetfulness. But we cannot avoid distraction when the professional structure makes them a condition of success, unlike the life of a therapist. Double exposure reminds us that interactions involve at least two people talking over a period of time. Clients may refuse to cooperate with psychological techniques because of the nature of their business or because they resent the potential for manipulation that the blatant searched for control can raise. If these reactions occur, the attorney has lost the battle for control over the interaction and also may have forfeited the confidence of the client in the lawyer's professionalism.

These problems may be considered mere irritations and their occurrence as minor risks to be tolerated in the quest for rational control. But could they be symptomatic of a more basic flaw in the scheme? I see these difficulties as part of a barrier between the worlds of the ideal lawyer-therapist-agent and the real attorney. It is an ice wall that solidifies when psychologists attempt to freeze an interaction into single exchanges for which an attorney must cultivate a particular frame of mind.

On one side of the wall, in the territory of the ideal, the continual search for control requires the attorney to find the key to power in each exchange. The key is knowledge of the client's psychological needs or conflicts and neutralization of the lawyer's similar instincts. If the lawyer holds the key, the encounter fulfills the lawyer's goal and (s)he must then begin to plan for the next interaction. If (s)he does not possess it, the encounter is a failure and there is nothing that the attorney can do to change the adverse outcome.

On the other side of the wall is the land of on-going interactions among people who simply try to cope with the pressure of the working environment by doing the best job they can of communicating with all of their clients over time. No single exchange seems that important because changing circumstances will modify the attorney's relationship with clients and others. Keeping these relationships within manageable bounds is a long-term project that will have moments of success and of failure. But the appropriate response to temporary adversities is not despair or termination of the relationship, but renewed efforts at communication that erects bridges between the parties.

Does the communication perspective provide a way of melting the ice wall between the two lands, if only partially? To discover the source of heat, we must return for a moment to a claim made in the introduction. Communication between lawyer and client affects and is affected by their personalities and the working environment. What our field has come to recognize over the last decade is that communication must be studied as a *process*, an on-going sequence of interactions between individuals in which participants receive feedback from others and the social environment influences the direction of the relationship over time. As Leonard Hawes has observed, each act of communication cannot be considered in isolation but must be examined for the influences on it and its influences on other acts.[27] Attempting to dissect the relationship through the isolation of single exchanges can distort the overall picture by elevating certain short-term characteristics above others that may be more significant in the long run.

The recognition of the importance of the processual nature of communication has had profound effects upon the predominant methods of study in the field. This shift has occurred in both the empirical and the rhetorical/interpretive areas of interest. At one time, communication theorists studies discourse in much the same way as the psychologists described above would do it. They would look at a single exchange as a message transmission from sender to receiver and try to discover the mental factors that determined whether the transmission was understood and, if so, whether the message influenced the receiver. Attitude change studies on the empirical side and neo-Aristotelian criticism on the rhetorical side differed primarily in the extent to which they sought to simplify the causal analysis and to generalize their conclusions to forms of communication beyond the phenomena under review. In either view, the single encounter was the paradigm of communication.

A new set of investigating tools developed as the process approach gained adherents in the last two decades. On the empirical side, researchers began to take their cues from symbolic interactionism or cognitive psychology in their assumptions about human behavior. These scientists did not believe that describing mental states would be a useful way of increasing our understanding of communication. Instead, they suspended consideration of internal states (by assuming rationality or, at least, goal-directed behavior) and began to look at the interactions themselves. To model extended discourse for the examination of interrelationships among communication acts, Hawes and his colleagues, among others, developed a Markov process analysis which permitted the computation of probabilities for certain patterns of interaction from experimental data.[28] It has become possible to describe in some detail typical patterns of interaction and the variables that affect and are affected by the information-seeking behavior that produces such communication.[29] Ethnomethodologists have pursued similar lines through field research of ordinary conversations to discover patterns of argument and turn-taking behavior.[30] The direction of these studies has been toward growing sophistication in the exposition of the anatomy of a wide range of human interactions.

But rhetorical/interpretive scholars have not ignored the implications of the process theory. The connection between hermeneutic phenomenology and speech communication, for example, has spawned work on the ways in which meaning is constructed through conversation between interviewers and interviewees.[31] Applied to oral history, the model establishes how the two parties move through conflict, contradiction, and contrariety in conversational sequences toward a mutual, richer understanding of a historical event.[32] The creation of a historical record by the confrontation of the historian's perspective with that of the interviewee is a process quite analogous to that of a lawyer who must align the client's recollection of a past situation with a vision of legally-operative facts that give rise to a cause of action.

A related line of research has been the discovery of rules for episodic types within the language-action paradigm. The application of speech act philosophy to particular episodes allows consideration of the ways in which actors choose among alternative communication acts to achieve the goals that are collectively generated as part of the encounter itself. One finding of this research is that the action performed by a statement and the effect of that statement upon another person is quite different when that statement is removed from the explanatory context of a longer episode.[33] Thus if a student learned communication by examining certain kinds of responses to individual statements, the a-contextuality of this knowledge would render it useless in a real conversation.

Uniting the idea of communication as process with the art of legal interviewing and counseling imparts a very different direction or emphasis to instruction. First to be abandoned is the assumption that the achievement of a certain mental state can guarantee control over an encounter with a client. The theories of episodic context recognize that a variety of intervening elements, including the previously-mentioned three Ds of doubt, distraction, and double exposure, can complicate and ultimately frustrate the manipulation of expressive content by the attorney.

Communication theorists direct attention instead to an understanding of episodes themselves, and the alternative paths that such episodes can take according to the reactions of the participants and the turns of events not within the control of the participants. The focus of strategy shifts from control to coping. The lawyer copes with the demands of communication by maximizing cooperation and minimizing conflict while leaving open the potential for further development of the relationship. (S)he should gain an intimate familiarity with the anatomy of interactions, the give-and-take of extended relationships and arrive at a recognition that even the most skillful communicators suffer occasional lapses. With these tools, the attorney develops confidence that (s)he can handle communication in real, uncertain situations without elaborate mental gymnastics.

The very notion that interviewing and counseling are parts of an on-going relationship between attorney and client is another characteristic that distinguishes the communication and the traditional psychological perspectives. When attorneys are encouraged to analyze the psychological underpinnings of each exchange as it occurs, they unwittingly isolate themselves from the client. Discourse in which one participant operates at a metalevel of consciousness and employs that understanding to direct the conversation according to her own goals raises suspicions in the other participant about her intentions. Even if the strategy seeks the long-run interests of the client, it can fail if too easily perceived and labelled as "strategic."

The lesson from the relational view of communication is that the process of communication itself cannot survive without mutuality of participation. Attorneys cannot assume that communication (as opposed to mere talk) will occur inevitably and that the only relevant question is how to jockey for psychological position with the client. Instead, clients must be drawn into discourse through a recognition of their role in determining the course of the episode. Their statements and responses must be treated with respect, not professional skepticism. The attorney must emphasize the coming-together of the participants to achieve mutual goals through discourse, and that the instruments that each party holds to accomplish the goals are different, not superior or inferior.

In this view, the client must participate actively in information exchange and decision-making not because it simplifies the attorney's taks or resolves a conflict in the client's subconscious but because the nature of communication episodes guarantees that the client will shape the interaction whatever (s)he does. There is no choice for the client between non-participation and participation in an interview or counseling situation because the client will react in some way; the only issue is what form the client's response will take. If the client withholds information or requires the lawyer to do all of the talking as part of a stance of passivity, the client neglects his responsibility in the system of interdependence created by the different instruments and understandings that the participants bring to the relationship.

The attorney's strategy of coping in this situation is to persuade the client to approach the episode on the basis of equal responsibility, not to attempt to fill in the gap with the attorney's psychological perceptions and prescriptions to relieve the client of the burden of mutuality. If the participants are unable to meet on some level of psychological equality and mutual respect, the outlook for long-term success in the relationship is not sanguine. The client must perceive from the attorney's approach to the relationship that mutual satisfaction derives from mutual responsibility.

A corollary to this emphasis upon equal responsibility is the importance of time in the attorney-client relationship. I have suggested that the psychological theory encourages the attorney to view each interaction as a separate transaction to be mastered. If the attorney does not succeed in gaining control over the client's problems in a particular transaction, little can be done to remedy or mitigate this failure. Every subsequent encounter is a new transaction that must be approached on its own terms, and there may or may not be similarities between encounters in the psychological forces that influence the client's behavior (or the attorney's behavior, for that matter). By contrast, the relational process view of legal communication finds that mutual perceptions and communication strategies develop over a much longer period of time. In real communication settings, early setbacks can be overcome by later efforts at reconciliation without impairing the overall relationship. Indeed, many senior attorneys are prized for their abilities to mediate in disputes and to make the best of bad legal situations. Why should it be supposed that such longer-term development of communication is not worth pursuing with clients?

The advice to attorneys from this recognition is that they should expect to cultivate opportunities to improve the channels of communication when necessary to enhance their relationships with clients.

Emphasis upon psychological preparation before each interview or counseling session may ritualize, and hence rigidify, these episodes into formal situations that the attorney avoids rather than welcomes. But the communication perspective counsels flexibility rather than fortification in the conduct of these sessions. Attorneys should grow more comfortable with such interactions, not more self-reflective and hesitant. Additional contact with the client can help to cement the bonds of cooperation or to make repairs, such as correcting misapprehensions, eliminating gaps in the factual record, or conveying adverse information without startling or depressing the client.

Within the limits of the economics of her practice, then, the attorney should open as many avenues for on-going communication as (s)he finds with experience to be necessary with particular clients. (S)he should strive to develop patterns of interaction that can cope with short-run changes in the moods of the client and the attorney and in the pressures of the working environment, while maintaining a satisfactory long-term business relationship. And (s)he may do so with the confidence that if particular episodes are not completely successful, coping strategies can be devised to rectify errors and revive mutual trust and cooperation. The attorney's ability to implement instruction in legal interviewing and counseling may depend ultimately upon avoiding the paralyzing despair associated with a perceived loss of control in the earliest meetings with clients. Defining control as psychological mastery rather than equality would seem to increase the odds of failure. The demands of the model lead to gradual disillusionment with the application of specialized psychological principles to the real world settings of communication.

We can summarize the contribution of the process view of communication and the points at which its direction diverges from that of the psychological theories by reconstructing the "lawyer" and "client" personas we met at the beginning of this essay. One distinction lies in the comparison of mental states. In the psychological model, the lawyer was rational to deal with the client's irrationality. Communication theories assume that both lawyer and client approach the interaction with equal, if different, forms of rationality (goal-directed actions). It may be a rationality limited by the influence of the environment but it is sufficient for the purpose of upholding their equal responsibilities for shaping the contours and outcomes of the episodes.

Another difference is the perceived roles of the lawyer and the client. In the psychological model, the lawyer actively removes barriers and explicates alternative means of solving problems, while the client passively recognizes and accepts the cogency of the lawyer's recommendations. But this relationship of lawyer dominance to client submission oversimplifies the varying requirements of communication in these settings.

Communication theories demand active participation by both parties in the creation of a factual record and the making of informed decisions to achieve satisfactory results over the long run. Because the client has responsibilities for the interaction that will be carried out with some degree of effectiveness no matter what the client says, the success of the relationship will vary directly with the effort the client devotes to these duties. The best lawyer in the world cannot help a client who refuses to disclose essential information or who constantly changes his mind about the appropriate legal posture. There may also be situations in which the lawyer must be passive in the face of very active client communication, such as a client who demands that the lawyer pursue a cause of action on principle against the lawyer's better judgment. The psychological perspective might counsel the attorney to engage in diversionary tactics or therapeutic intervention to the point of antagonizing the client.

A final point of divergence lies in the connection of roles to communicative style. In the psychological model, the lawyer acts as therapist or means-seeker. These roles codify particular encounters in advance by superimposing a role model to be enacted within each conversation. Codification formalizes interactions and the peculiar demands of the psychological theory make them ordeals to be minimized. Success or failure can and should be tallied independently after each interaction, for lost ground is unlikely to be recovered.

Communication theories replace the interactions within the context of a long-term working relationship. Flexibility to move with the unexpected turns that real discourse takes is the watchword for the lawyer. Losses in some encounters (due perhaps to the intervention of doubt, distraction, or double exposure) can be made up through concerted effort and intelligent planning for other episodes. To take advantage of these possibilities, lawyers must allow themselves maximum opportunities for initiating contacts with clients within the constraints of time and economics. By burdening each interaction with the baggage of prepared mental states, the psychological theory inhibits this openness.

APPLYING THE PROCESS VIEW: A GLANCE AT RESEARCH NEEDS AND INSTRUCTION

Aside from the points discussed previously, are there reasons to believe that the process view of interviewing and counseling maps the realities of legal communication more closely than the psychological theories? After all, we may not be talking about wholesale differences in technique, but only slight variations for special situations. I have already suggested that the distinction reduces to one of direction or emphasis for the attorney's normal efforts. It may also be true that a model is appropriate for one type of client and one type of practice and not for another (such as psychological for visibly-disturbed clients and high-volume divorce practices and communication process for business clients and complex corporate practices), and we ought to apply them according to a fine-tuned judgment of role requirements. Is there any evidence that when faced with the uncertainties of real world practice, the attorney should turn first to the communication process model for guidance before taking on the psychological program of instruction?

We will not get a definitive answer from the existing body of empirical investigation on this topic. The discussion yet to come will show that for our field, legal interviewing and counseling represent virgin territory. Yet my own experience in law practice bears out at least parts of the thesis. Young associates often have the opportunity to observe partners during interviews and counseling sessions applying their own "naive" versions of proper technique. Since many attorneys enjoy discussing with their colleagues the idiosyncrasies of their clients, I usually had a good idea of their perceptions about what strategies would be appropriate for particular clients and why. The styles actually adopted often mirrored the conversational models of the psychological view (the attorney would second-guess and analyze the client, and then direct the discussion) and of the communication process view (the attorney approached the client as an equal and encouraged active participation).

On the whole, the more respected and successful partners employed the second approach. The members of the first group were often described by their peers as "brilliant and aggressive" lawyers who could achieve unusual results through sheer hard work, but their relations with clients was at best a rocky road. They would often be overly optimistic and narrowly-focused in their advice. They were willing to exhaust the client's resources and patience to pursue fruitless causes and were quick to retreat behind a conservative definition of the advocate's role if things turned out badly.

The supervisory roles were more often given to partners who could keep client relations on an even keel and who took a long-term perspective on the client's interests. These individuals were particularly skillful at patching up misunderstandings and digging for information that the client might not disclose initially. They also were more likely to give the client a balanced, honest evaluation of the likelihood of success on the merits of their claims and a realistic assessment of the available alternatives. Over time, the partners of the second group would come to be identified as the liaison between the firm and the client, able to serve a number of roles (chief counsel, board director, advisor) that benefitted both client and law firm without falling precisely within the bailiwick of either side. Based upon this admittedly limited data, then, the career paths of at least some attorneys seems to depend upon whether they absorbed the lessons of the process conception of interviewing and counseling.

Where should researchers go to flesh out these lessons? Much of the work remains to be done, and this essay can do little more than point to the general direction of such research. Yet encouraging signs exist that interest in reconstructing legal interviewing and counseling according to the process view is growing. In their book Communication in Interviews, Michael Stano and N. L. Reinsch, Jr. develop eight communication principles that flow from the process view and then apply these principles to a variety of interview settings, including legal interviews.[34] Their effort, which is supplemented by the findings of social psychology, reinforces my hunch that a major part of the work of our profession in this area will be to refocus what has already been done in psychology to tame the tendencies toward formalism and manipulation that strict adherence to the recommendations engenders.

Beyond this recasting of traditional advice and common sense experience, researchers in our field need to return to the examination of the interview and counseling sequence itself to define them as extended communication episodes. Field surveys and quasi-experimental studies should be conducted to identify patterns of communication and to discover how the participant's personalities and the working environment change the direction of actual discourse. This research could also determine how participants adjust their position to overcome or accommodate these changes without scuttling the underlying purpose or context for the interaction.

Observation of the techniques of discourse used by experienced attorneys would be particularly useful in establishing what long-term strategies are most effective for coping with the interferences of doubt, distraction, and double exposure. These lawyers have had enough contact with the three Ds to predict what influences they commonly will have upon the lawyer's work. Case histories discussed with communication researchers (with safeguards for confidentiality) would allow us to share in the richness of their adaptive behavior.

One specific aspect of legal interviewing that would benefit from theoretical and empirical work within speech communication is the discrepancy between the client's understanding and recollection of a situation and the lawyer's understanding of the elements of proof that are necessary to sustain a cause of action in a suit. The difficulty that faces the participants in an interview is mutual understanding without coercion that distorts subsequent statements.

The lawyers must convey to the client an awareness of what factual questions must be resolved without encouraging the client to twist her recounting of the facts to fit a particular cause of action. The client must convey to the lawyer an accurate portrayal of the situation without making so strong a presentation that the attorney gets misleading signals about the depth of the client's commitment to a particular end or course of action. What the communication scholar can contribute to the analysis of these problems is a description of procedures of confrontation of viewpoints, correction, and supplementation that can be introduced into the context of the interview itself. The process of hermeneutic conversation now being applied to oral history can be extended as long as the researcher is sensitive to the special contextual qualities of the legal setting.

In the area of legal counseling, the communication specialist can offer insights into the complicated process by which attorneys convey adverse information to clients over extended period of time in an effort to help them accept the situation and decide how best to conduct their affairs in light of it. A fascinating hint of what could be done by our field in contained in an article by a legal scholar on analogies to communication with the dying. He describes the work of Eleanor Kubler-Ross and argues that lawyers must devise similar practices to "cool the mark out" (a human drama once discussed by Erving Goffman) after the legal system rules unfavorably on the client's claim. Similar work could be done that would help the attorney master and reconcile the complex interactions that accompany the assumption of multiple counseling roles for important clients. Attorneys who accept such communication responsibilities without a clear understanding of how to use communication to balance conflicting demands in such relationships may suffer. They can antagonize people unnecessarily, miss important conversational cues, and fetter themselves with serious ethical dilemmas that ultimately may destroy their careers. Emphasis upon communication contexts reminds the lawyer that ethical questions are not washed away by the professional role but are inevitably raised afresh each time an attorney and client discuss business. Rather than assuming them away, as the psychological theory tends to do, the communication perspective underlines the importance of reasoning and decision on these questions and describes how communication strategies can be used to implement the decisions made.

Finally, the communication professor can assist the clinical law program instructor to assemble a curriculum that teaches lawyers to be comfortable with interviews and counseling. Writers of the traditional psychological persuasion have devoted a lot of ink to the translation of their views into law school seminars, but the complexity of the material that must be absorbed about human psychology before the first attempt at interviewing or counseling often stymies such efforts. The process view points to a healthier form of instruction that emphasizes the practicing of the skills themselves with trained participants who assume the position of clients. Some psychologists have come to appreciate the value of this style of instruction even within the realm of traditional psychotherapy. They have coined a name for learning by doing in communication -- microcounseling.[36] Speech instructors familiar with public speaking methods already have the tool to set up microcounseling programs for lawyers. All that is needed is the research base in the anatomy of interviews and counseling encounters to supply empirical grounding and course materials.

If I were compelled at gunpoint to condense down to a sentence the essence of the process view when applied to legal interviewing and counseling, I would say that it tells the lawyer to follow her instincts on where to begin. The emphasis upon understanding communication episodes and their contexts before considering how psychological variables may alter these contexts and upon learning communication strategies before asking how psychological insights can be employed to improve pre-existing communication patterns may seem a subtle difference. But I believe it is far more consistent with the underlying purpose of confidence-building than is the generation of a complete communication strategy where there was none before from the tenets of a psychological theory.

I see the problem of learning to interview and counsel clients as similar to that of the person preparing for a formal ball. Thanks to the process view, attorneys need no longer feel compelled to spin the golden raiment (dream coat?) of the therapist or motivational psychologist before they can summon the courage to dance the minuet with the client. Instead, attorneys can take dancing lessons that allow them to tread on someone else's feet as they become familiar with the steps that lead to smoothness. When the ball begins, the crowd will see who gets the most requests.

NOTES

*David B. Hingstman is a doctoral candidate in the Department of Communication Studies at Northwestern University. He received his J.D. from Harvard Law School in 1978.

[1] See, e.g., S. H. Peskin, "Attorney-Client Interview: Strategy and Tactics," Trial, Vol. 14, July 1978, pp. 43-45.

[2] See David A. Binder and Susan C. Price, Legal Interviewing and Counseling: A Client-Centered Approach (St. Paul, Minn.: West Publishing Co., 1977).

[3] See, e.g., Andrew S. Watson, The Lawyer in the Interviewing and Counseling Process (Indianapolis: Bobbs-Merrill, 1976).

[4] See, e.g., Gary Goodpaster, "The Human Arts of Lawyering: Interviewing and Counseling," Journal of Legal Education 27 (1975), 5-36.

[5] Mark K. Schoenfield and Barbara P. Schoenfield, Interviewing and Counseling (Philadelphia: American Law Institute-American Bar Association Committee on Continuing Professional Education, 1981), p. 7.

[6] Goodpaster, p. 21.

[7] Goodpaster, p. 33.

[8] James C. Freund, "Many 'Pesky Postulates' Plague Murphy's Lawyers," Legal Times of New York, April 25, 1983, p. A19.

[9] See Watson, pp. 5-26.

[10] Schoenfield and Schoenfield, pp. 18-19.

[11] Schoenfield and Schonfield, p. 24.

[12] Schoenfield and Schoenfield, p. 25.

[13] Watson, p. 10.

[14] Watson, pp. 8, 11, 24 and 25.

[15] Watson, p. 141.

[16] Emory Cowen, for example, found that many individuals go to divorce lawyers with personal problems because the lawyers are trusted and relatively accessible. But conflicting duties and role perceptions by lawyers created a much different counseling environment than that produced by mental health professionals. See Emory L. Cowen, "Help Is Where You Find It -- Four Informal Helping Groups," American Psychologist 37 (1982), 385-395. Cowen also notes that there is no trustworthy data on the effectiveness of such informal caregiving and that testing for it would be extremely difficult. Cowen, p. 393. This may be a sobering counterweight to the normative claims of the psychoanalytic theorist.

[17] Schoenfield and Schoenfield, p. 20.

[18] Schoenfield and Schoenfield, p. 20.

[19] Binder and Price, p. 8.

[20] Binder and Price, pp. 9-18.

[21] Goodpaster, p. 24.

[22] James R. Elkins, "The Legal Persona: An Essay on the Professional Mask," Virginia Law Review 64 (1978), 747.

[23] Binder and Price, p. 18.

[24] Binder and Price, p. 19.

[25] Richard M. Cyert and James G. March, A Behavioral Theory of the Firm (Englewood Cliffs, N. J.: Prentice-Hall, 1963).

[26] "Irrational" is a fluid-enough term to cover varying degrees of rationality. It can serve to describe any state of mind from insanity to unmediated goal-seeking behavior and everything in between. Where the psychologists draw the line depends upon the epistemic priorities of the theory. In a "disease" model of mental activity, the absence of ego control over certain behaviors marks the boundary. In the "teaching" model of motivation, confusion over the ordering of need priorities and over the means for fulfilling needs is a kind of "irrationality."

[27] Leonard Hawes, "Elements in a Model for Communication Processes," Quarterly Journal of Speech 59 (1973), 13.

[28] Leonard Hawes and Joseph M. Foley, "A Markov Analysis of Interview Communication," Speech Monographs 40 (1973), 208-219.

[29] For a review of this work, see Charles R. Berger, "Beyond Initial Interaction: Uncertainty, Understanding, and the Development of Interpersonal Relationships," in Howard Giles and Robert N. St. Clair, eds., Language and Social Psychology (London: Blackwell, 1979), pp. 122-145.

[30] See, e.g., Robert E. Nofsinger, Jr., "A Peek at Conversational Analysis," Communication Quarterly 25 (1977), 12-20.

[31] See Michael J. Hyde, "Philosophical Hermeneutics and the Communicative Experience: The Paradigm of Oral History," Man and World 13 (1980) 81-98; E. Culpepper Clark, Michael J. Hyde and Eva M. McMahan, "Developing Instruction in Oral History: A New Avenue for Speech Communication," Communication Education 30 (1981), 238-244.

[32] Eva M. McMahan, "Communicative Dynamics of Hermeneutical Conversation in Oral History Interviews," Communication Quarterly 31 (1983), 3-11.

[33] Thomas S. Frentz and Thomas B. Farrell, "Language-Action: A Paradigm for Communication," *Quarterly Journal of Speech* 62 (1976), 340.

[34] Michael E. Stano and N. L. Reinsch, Jr., *Communication in Interviews* (Englewood Cliffs, N. J.: Prentice-Hall, 1982).

[35] G. L. Bahr, "Client Counseling For Frustration of Expectations: We Can Learn from the Dying," *Tennessee Law Review* 49 (1982), 511-535.

[36] See Allen E. Ivey and Jerry Authier, *Microcounseling: Innovations in Interviewing, Counseling, Psychotherapy, and Psychoeducation* (Springfield, Ill.: Charles C. Thomas, 2d. ed., 1978).

LEGAL INTERVIEWING AND COUNSELING: A RESPONSE TO HEGLAND AND HINGSTMAN

Vivian I. Dicks

It does not matter whether her specialty is criminal or civil law, divorce, probate, securities, labor, tax, personal injury, estates and trust, or any other of a myriad of legal areas, every attorney faces the need to master interviewing and counseling skills. The attorney who dislikes or is inept in trial skills, can avoid litigation. To avoid interviewing and counseling, however, is to stop practicing law. Thus, the information about interviewing and counseling shared at this Conference, the research it inspires and the educational methods discussed, potentially can affect more attorneys than any other single topic to be addressed in the next three days. Furthermore, as Hingstman observed, for the field of communication, investigation into legal interviewing and counseling represents virgin territory.[1] The potential effects and the untouched nature of the subject make this an exciting area for investigation.

IDENTIFICATION OF ASSUMPTIONS

Although there is relatively little research on interviewing and counseling in the legal setting, much has been written on the topic generally. Many of these articles make assumptions about the processes. As a first step into this territory, let us identify some of these assumptions and how the papers presented illustrate or address them.

The first assumption shouts at us in the title of this section of the Conference, as well as in the titles of the papers presented. We speak of interviewing and counseling as if it is a single process, as if a natural nexus exists between the two activities. The level of confusion regarding this relationship is evidenced by the title of an article by Goldsmith, which referred to the initial "Consultation" between attorney and client, but explained the research in terms of the initial "interview."[2] Stewart and Cash, in their book on interviewing, assign an entire chapter to an activity called "counseling interviewing," suggesting counseling is a subset of the class of interviews.[3] Hingstman implies there is a distinction by occasionally separating the two when discussing such things as what psychology claims an interview should accomplish and describing counseling as an extension of the interview. He makes another such distinction when discussing what the legal specialist can offer.[4] Overall, however, the structure of the paper encourages the two concepts to merge. Hegland, on the other hand, clearly distinguishes between the two, assigning each a chapter of its own.[5] There is no time, definitional or functional separation, however except by implication. There is evidence of internal confusion, furthermore, in that the interviewing chapter contains a section on "giving advice," something which seems to fall more logically into the counseling chapter.[6]

Whether there is or is not a natural connection is less important, for the moment, than the fact that we have not recognized and addressed the assumption. We need to ask if interviewing is a separate process from counseling, each requiring special skills and if, when we merge the two, we create a product different from its parts and needing yet a third set of skills.

A second assumption is that we only need to concentrate on the first meeting between attorney and client. Thus, Bergstein's article opens with a paragraph asking the reader to assume "someone is about to seek your advice," implying a first contact with someone who may become a client, if the attorney is skillful. Goldsmith was satisfied limiting his research to the "initial" interview. The Court Practice Institute chapter on interviewing confines itself to the first meeting. Menkel-Meadow and Ntephe, discussing the American Bar Association Lawyering Skills Program, justify the training, in part, by claiming lawyers often spend too much time on "initial" interviews. They do refer to the existence of follow-up interviews, but describe them as "necessitated by ineffecient initial contacts." Hegland opens his interviewing chapter by describing a "first time" situation and then gives recommendations which imply a first encounter -- telling the client what to expect, getting him to narrate the story, and getting him to tell the truth.[7] These would seem to be less of a barrier if there was an on-going, trusting, working relationship.

Perhaps this emphasis on initial contact reflects a recognition that this is a most difficult and important time, or that our research is just starting and this seems to be a logical place to begin. On the other hand, it may reflect a desire to do everything right at the first encounter so that the client will go away and not bother us until we call him. Few attorneys seem anxious to speak with the client any more than necessary.

Hingstman implicitly provides a tool for undermining this assumption. By recognizing the communication approach as one of process, he not only takes some of the restraints off analysis of the first encounter, but opens the door to approaching interviewing and counseling as occurring over a period of time.[8] This may provide a new perspective from which to evaluate what happens in that initial contact and from which to judge the number and nature of further contacts with a client.

The third assumption is that interviewing and counseling are limited to clients and that clients are sufficiently alike to justify a single set of skills.

Virtually all of the literature assumes attorneys are interviewing clients, and addresses advice toward successfully handling that activity. It may be, however, that non-client family members or witnesses will come under the fact-finding scrutiny of the attorney.[9] This cannot be dismissed as falling within the realm of the literature on trial examination of witnesses. The witnesses who appear at trial may have been selected from many potential witnesses. The evaluation and selection of all witnesses presupposes an interview with each. Many of the same problems exist here as do with a client. The need to get a full and factual account of events and to evaluate the person's tolerance for trial or a deposition exists in either case. The attorney's interests differ, however, since, at least for the time being, she does not want the witness for a client.

Just as she finds she must interview non-clients, the attorney may find she also needs to counsel them, at least to the extent of telling them what to expect, how to respond if approached by the other side, and perhaps to the point of convincing them to get their own attorney.

Note that neither Hegland nor Hingstman addresses the problem of the non-client interviewee, even though nothing in the Conference material imposes such a restriction.

When we investigate legal interviewing and counseling we must recognize all potential interviewees and determine deliberately whether to exclude some, or to include them and analyze how approaches might differ.

Even if we do limit our study to interviewing and counseling clients, we must make a greater effort to distinguish between types of clients. We need to be aware of the implications of producing a body of literature on interviewing and counseling which does not at least draw broad distinctions, for example, between the criminal felony client and the personal injury client. Perhaps such a distinction takes us too much in the direction of the psychological theories of which Hingstman is critical.[10] If that is true, let us say so and then identify the implications for the two processes.

The three assumptions identified here certainly are not the only ones made, nor does failure to address them inhibit the usefulness of existing literature and training. Awareness of them, however, may help us locate others and may generate ideas for models and research in the legal setting.

"COMMUNICATION AS PROCESS" APPROACH

Having identified some assumptions we are currently making in the study of the process of interviewing and counseling, and some of the ways the papers presented today address those assumptions, let us set that approach aside and look at the papers by themselves. Hingstman offers a theoretical perspective, while Hegland offers practical advice to the attorney who wants to know what to say and do. A comparison of the two papers gives Hingstman's analysis validity, and shows why Hegland's approach seems so helpful.

Hingstman describes a syndrome implied by the psychoanalytic approach to interviewing and counseling involving a lawyer and a client persona. The lawyer persona he describes as having the qualities of a professional thinker and therapist, single-mindedly devoted to the client's interests, having no trouble detecting and channeling the irrationality of the client, and always able to exercise reasoned judgement. This image is a confidence building device he says, to reassure the attorney she has the tools for dealing with client irrationality.[11] This seems to describe the perspective of Hegland's approach. The first suggestion he makes is for the attorney to tell the client, early in the interview, how she, the attorney, conducts interviews, how to decide what to say ("tell me everything you think is important"), who speaks when ("when you are finished, I will ask some questions"), how long the interview will be and perhaps, the fee. This is a clear seizing of control by the attorney, who sets the agenda for the interview.[12] An attorney who reads this advice can now relax, confident she knows what to say. Hegland, however, although his advice seems to fit the psychoanalytic pattern, recognizes the same thing Hingstman does, that this approach will not work with all clients. Since his advice has to be practical, however, he addresses this problem not by suggesting the attorney forsake her agenda setting speech, but by varying it according to what she thinks the client's anxieties or questions might be. Thus, she retains control and confidence. A communication process approach might abandon the opening speech. As Hingstman describes it, communication theorists do not assume that a confident mental state can guarantee control. The strategy becomes one of coping rather than control. Thus it is possible that the attorney should not be overly concerned if she initially lacks firm control. Her confidence comes from knowing she can handle uncertainty.[13]

The influence of the psychoanalytic approach permeates Hegland's advice. When he encourages the attorney to get her client to narrate his story, he addresses a primary barrier to narration, the attorney's "basic insecurity with the professional role," which leads her to interrupt with questions, thus demonstrating she is in command.[14] The recognition is another sign that Hegland is aware of the need for a different solution to the attorney confidence problem.

A broad view of Hegland's approach uncovers a struggle between the practical and the theoretical. He is aware of the need for an answer to such questions as: What do I do first? What next? What do I say? He responds by outlining steps and providing the instant confidence these steps and statements imply. Thus he adds warnings that clients will differ and that the attorney's insecurity may be a barrier. Perhaps the most telling evidence that Hegland is dissatisfied with the constraints of the current confidence/control perspective is the section entitled "Getting Used to Chaos."[15] Here a need for Hingstman's communication process approach may be clearest. It promises a confidence built on the ability to cope with chaos, rather than one built on control, as implied in psychological theories. It appears Hegland will welcome Hingstman's suggested perspective.

RESEARCH and EDUCATIONAL IMPLICATIONS

Our discussion of current literature, assumptions and theoretical perspectives, to be worthwhile, should point us in the direction of reevaluation and identification of new research areas and educational methods.

Hingstman claims that for communication specialists "a major part of the work of our profession...will be to refocus what has already been done in psychology," to recast traditional advice and common sense.[16] While that may be worth doing, we must remember that the research which produced much of the existing material was not designed or interpreted from a process perspective. Since research results are affected by the design of the study, which is itself affected by the perspective and bias of the designer, we may be wise to redesign some of the research and to be careful not merely to recast the conclusions into the language of communication.

One of our major needs is for descriptive research. We need to know what takes place in legal interview and counseling situations and how satisfied the attorneys and clients are. Goldsmith's research with the Legal Advocate's Program at the University of South Florida is a good initial model. His methods, along with Delia's comments about the research, should provide ideas which could generate more such research almost immediately.[17] While we certainly will have to face the attorney-client privilege barrier, it is not insurmountable.

We might also examine the interviewing process as it applies to non-client individuals. Recall that one of the assumptions made in current literature is that interviewing skills are limited primarily to dealing with clients. While this may be true, insight into that unique relationship might be gained by comparison to interviews conducted with non-clients. Here we are not faced with the attorney-client privilege, although other problems may arise.

Another assumption, that interviewing and counseling are a single process, could also be tested with this descriptive material. If we generate a functional definition for each, one that would allow a distinction between an interview element and a counseling element, we could determine how much of each occurs in the initial contact between attorney and client. Follow-up research on future contact could also help us determine if our emphasis on the initial contact is justified.

Research regarding client expectations before seeing an attorney would also be useful. Since, as Hingstman notes, the communication process presupposes mutuality of participation, knowledge of client expectations would tell us how difficult that level of participation may be to gain.[18]

An analysis of the way in which difficult information is clarified and applied, and misunderstandings are avoided or identified and corrected, would help, especially for understanding the counseling process. Some material to justify and direct such research may be found in research into legal malpractice claims. Unjustified or unrealistic expectations on the client's part are recognized as a source of such suits.[19] Those expectations can be created, identified or adjusted in the interviewing and counseling process.

Perhaps, before anything else can be accomplished, we need to generate a comprehensive bibliography of material already available not only in communication, but in other fields as well. Psychology, of course, is one source, but attorneys have generated much material on their own. The footnotes of legal journal articles, as well as the journals themselves, are additional sources.

Contributions to education are difficult until we are more knowledgeable about the process. Law, however, has already started to address the problems with clinical programs which give law students experience and with seminars for practicing lawyers. These seminars include lectures, videotaped role playing and personalized evaluation. These would seem to be good bases for developing the communication process perspective since they can increase a person's confidence in her ability to cope, without necessitating control.

Interviewing and counseling are central to any law practice. Attorneys feel a need to do their job better and are looking to each other and the academic community for ideas. To be useful, however, we must focus on their unique qualities and problems. This Conference is a good start in search of how our unique perspective can contribute to that focus.

David Hingstman closes his paper with a comparison to a formal ball. He implies communication has some fancy steps of its own which attorneys may find worth learning in their effort to keep from stepping on clients' toes. He is correct. It is time we stopped being a wallflower. Let's dance!

*Vivian I. Dicks is an associate professor and Chairman of the Communication Studies Department at the University of Detroit. She received her Ph.D. from Ohio State University in 1976 and her J.D. from the Detroit College of Law in 1982.

[1] David B. Hingstman, "Legal Interviewing and Counseling: Communication as Process," Unpublished paper, Summer Conference on Communication Strategies in the Practice of Lawyering (1983), p. 20.

[2] John Daniel Goldsmith, "The Initial Attorney/Client Consultation: A Case History," Southern Speech Communication Journal 45 (Summer 1980), 394-407.

[3] Charles J. Stewart and William B. Cash, Interviewing: Principles and Practices (Dubuque, Iowa: Wm. C. Brown Company, 1974).

[4] Hingstman, pp. 5,21.

[5] Kenney F. Hegland, "From the Legal Profession: Legal Strategies and Research Needs in Interviewing and Counseling," Unpublished paper, Summer Conference on Communication Strategies in the Practice of Lawyering (1983), pp. 1,16. This same material can also be found in Hegland's book, Trial and Practice Skills (St. Paul, Minn.: West Publishing Co., 1978), pp. 192,302.

[6] Hegland, p. 13, also in Trial and Practice Skills, p. 210.

[7] Melvyn H. Bergstein, "How to Relate to Your Client and Yourself," Case and Comment 86, (September-October 1981), 19; Goldsmith, 394; Alan E. Morrill, Trial Diplomacy, 2d ed. (Chicago, Ill.; Court Practice Institute, Inc., 1979), p. 148; Carrie Menkel-Meadow and Azike A. Ntephe, "Clients Are People -- or Are They?," Barrister 10, (Winter, 1983), 12-13; Hegland, pp. 1,2,4,10 also in Trial and Practice Skills, pp. 192, 193,196,205.

[8] Hingstman, p. 12.

[9] As a step toward undermining this assumption see Stanley E. Jones, "Directivity vs. Nondirectivity: Implications of the Examination of Witnesses in Law for the Fact-Finding Interview," Journal of Communication 19 (March 1969), 64.

[10] Hingstman, pp. 1-11.

[11] Hingstman, pp. 2,4.

[12] Hegland, p. 2, also in Trial and Practice Skills, p. 193.

[13] Hingstman, p. 16.

[14] Hegland, p. 4, also in Trial and Practice Skills, p. 197.

[15] Hegland, p. 6, also in Trial and Practice Skills, p. 199.

[16] Hingstman, pp. 20-21.

[17] Goldsmith; Jessie G. Delia, "The Initial Attorney/Client Consultation: A Comment," Southern Speech Communication Journal 45 (Summer 1980), 408-410.

[18] Hingstman, p. 16.

[19] Avoiding Legal Malpractice Claims, (St. Petersburg, Florida: Professionals Risk Management and Service Company), p. 3. The interest of insurance companies in preventing malpractice claims may suggest sources of funds for research on the counseling process.

LEGAL INTERVIEWING AND COUNSELING: CREATING SHARED SOCIAL REALITIES

Robert E. Nofsinger

As other papers in this collection have demonstrated, we know (as teachers and scholars) a good deal about the general communication skills involved in interviewing and counseling.[1] We also know about effective strategies to employ in general interviewing and counseling situations, although somewhat less about effective strategies in the legal setting. Hegland, who has a law background, gives excellent practical advice on specific communication skills and strategies.[2] His treatment places some emphasis on both the client's and lawyer's state of mind and views communication as a practical art which one brings to bear on everyday legal work. He presents no overall communication framework or perspective, but much of his advice to lawyers is implicitly process oriented. Hingstman, who also has a law background, rejects typical psychological frameworks as having major practical defects from a communication point of view, and his treatment is explicitly process oriented.[3] He discusses the interpersonal relationship between lawyer and client and also legal decision making from the communication-as-process perspective.

The process perspective is currently in vogue as a way of teaching and talking about communication, and even researchers are seriously heeding Smith's decade-old call for process oriented studies.[4] An often unrecognized implication of this perspective is that most of the social things that transpire when people communicate together should be regarded as products--actual creations--of the process, rather than merely concomitants of it. It is easy to see that symbolic acts and conversational episodes are communication phenomena and only a little more difficult to conceptualize agreements, decisions, and relationships as fundamentally interactional in nature. It is substantially more difficult to see the everyday concepts of legal practice, such as the client's legal (or business, or family) history, the facts of the case, the intentions of those involved, and the immediate goals of the client as being interactional, negotiated, and created through communication. In this paper, I propose to push the communication-as-process perspective to its ultimate limits by making communication absolutely central to everyday activity, especially legal interviewing and counseling. My task will be to help us conceive of communication as the thread from which the very fabric of everyday legal practice is woven, so that we are able to regard facts, past events, societal norms, and even such supposed mental states as recollections as being the products of communicative activity. This stance is similar to that taken by some ethnomethodologists, and requires us to momentarily abandon our common sense conviction that the social world "is there," "exists as fact," and is "given to us."[5] We shall begin by taking seriously one of our most oft expressed axioms: Meanings are in people.

Communication as Reality Construction

The usual attitude of people toward the working world is that the events of everyday life exist independently of our communication about them. Schutz describes this as the "natural attitude of everyday life."[6] Of course, everyone recognizes that communication is part of the everyday working world, but the events we communicate about are assumed to be independent of our communication about them. The accident that happened yesterday occurred as it did regardless of people's perceptions of it or their pronouncements about it, and it remains unchanged today by what we are currently saying about it--or so people routinely believe. But to what extent do people *act* on the basis of unperceived, uninterpreted, undescribed, untalked-about and therefore unmeaningful events?

People act on the basis of *events-as-interpreted*, on the basis of their own meanings for things. These meanings are *not* inherent in the brute, uncommunicated-about world. Events themselves are inherently equivocal in meaning; we usually say ambiguous. Meanings are created by people through interpretive work which renders events intelligible to us in familiar terms. Through the communication process we assign cultural categories and thus produce for ourselves an event of a recognizably certain type.[7] The communication process allows us to construct certain characteristics of the event, or its background or context, by taking those characteristics for granted; we establish others when we explicitly mention them.[8] As Loftus and others have so clearly demonstrated, even eyewitnesses not only evaluate and judge but actually remember an event as a function of the language used to communicate about it.[9] And we must remember that most people who come to know about an event do not have the direct eyewitness experience at all. The simple question, "Did you hear about the accident yesterday," produces a meaningful, interpreted event for us. It *did* happen, since this is taken for granted by the utterance. It *has* a certain sense of continuity, since we can talk about it today as having happened yesterday. And it *is* a familiar and intelligible type of event: an accident. An unfortunate death of a teenager will be the topic of conversation and news accounts again and again, and through this process people will make sense of it and react to it as "a suicide" or "an accidental overdose." People will then act toward their own family members, their companions, the school authorities, the decedent's family, and so forth on the basis of this event-as-interpreted which has become social reality for us.

If we can suspend our common sense conviction in the giveness and facticity of events, we can see that "reality" consists not of brute, unsymbolized happenings, but of meaningful events-as-interpreted. Events-as-interpreted are, in turn, sets of meanings produced through communication. Our "reality" is a social reality that is made to seem factual. Accordingly, when we say that communication is a process we mean that it is a process of constructing social reality. These claims may be more completely understood by reiterating them with respect to a specific communication context: legal interviewing and counseling.

Interviewing and Counseling

as Creating "Objective" Reality

As the lawyer and client begin to communicate about the problematic events that will become their mutual concern, they will be oriented to a common factual domain, the everyday world, which they will experience and communicate about as having six properties.[10] They both will treat objects and events as examples of types of events, as instances of the recognizably same category; this is typicality. They will both make judgments about the probability of various things happening; this is likelihood. They will both compare the problematic events with other past and hypothetical events to enrich their understanding of the matters under discussion; this is comparability. They both will be able to assign prior conditions as the causes of the problematic events; this is causal texture. They can both discover means-ends relationships in the behavior of the people involved in these events; this is technical, or as I shall say, tactical efficiency. And they will both perceive the above five properties as necessary characteristics of a given natural order; this is moral requiredness. Of course, in most instances the lawyer and the client will not have firsthand knowledge of the identical aspects of their mutual concern. The lawyer's view will include general knowledge of society's functioning and specialized knowledge of legal processes, while the client's view will include general knowledge of society's functioning and specialized knowledge of particular circumstances related to the events under discussion. Neither has a complete reality to work with (although both assume that there is some such reality), yet both will come to recognize a (more or less) shared reality that is typical, likely, comparable to other everyday events, causally textured, tactically efficient in terms of discernable means-ends relationships, and all this necessarily so. Two (or more) distinct social realities will have been replaced by a mostly shared social reality--an intersubjective reality. On the basis of this intersubjective social reality both lawyer and client will make important decisions, possibly including the decision to try to "sell" their social reality to other people through processes of negotiation or litigation. The lawyer and client have created reality together.

A major part of the client's participation in this creative process is the description of some set of past problematic events and circumstances--the client's account. As the account proceeds, the client employs language which renders visible certain features of those events which have prompted the visit to the lawyer. The client uses common everyday terms to categorize the events, and these terms presuppose and imply certain everyday features of the social world assumed to be known in common between client, lawyer, and other competent members of society.[11] Thus, the ordinary obligations between neighbors, the expected degree of cooperation between employer and employee, the usual trust between husband and wife, the normal degree of freedom accorded a live-in partner to discipline the other partner's children, the routine practices of driving a car through a parking lot, the intentions that entering a building in a particular manner suggest, the probability that the seller of some item would not have known about serious defects in it, the sets of behaviors that typically imply the operation of a revenge motive, and so on are displayed so as to be noticed through the lawyer-client conversation. In some cases these features of the everyday world are presupposed by what is actually said, and in some cases they are implied. Either way, they are made a part of events by being taken for granted--by it being taken for granted that these matters are known and understood in common. For example, the utterance, "Then I started to notice that my boyfriend was getting home later and later each night," seems to take for granted that client and friend are not married, possibly that they are living together, that the client is in a position to know what time the friend gets home, that he used to get home at a standard and earlier time, that there is some probable explanation or reason behind his change in behavior, that this is a matter of some importance to the client, that these developments violate in some way "what we all know" to be the normal patterns of behavior between two people in this sort of relationship, that this change in behavior is somehow related to what the client has just talked about (the word "then" is the clue), and that this event is real and actually happened. Of course, the lawyer knows that the client may be remembering selectively, may be exaggerating certain parts of the story, or may even be lying about some things, and so the lawyer will probe and question in order to enhance a viable interpretation of the client's account. The lawyer's questions modify that account.

As the interview progresses, a story begins to emerge that is believed by both lawyer and client. This is very likely not the exact same story that the client would have told in a solo narration because the emerging story is interactively constructed. Each participant in the interview states, questions, proposes, reveals interpretations, and revises the meaning of the problematic events. Current interpretations trigger retrospective reinterpretations of what was said (or believed) earlier.[12] Present talk (labels, symbols, taken-for-granteds) is used to make past behavior intelligible in terms of some set of meanings. These meanings change during the course of the interview as both lawyer and client use "what everyone knows" about routine activities to construct interpretations of the problematic events of interest.[13] These interpretations become the events-as-interpreted, the "true" story in socially understandable and linguistically describable form. It is this story that interview participants see as unproblematic, or at least acceptably less problematic, reality and it is this story upon which they base their subsequent actions. From the perspective of communication-as-reality-construction, both our sense that the details of this shared story are objective facts (which exist independently of anyone having talked about them) and our sense that the everyday world itself (of which this story is a recognizable instance) has this same independent and objective existence are products of people's accounting and interpretive practices.

The lawyer-client interview appears as a sort of negotiation from this perspective, though not so adversarial as many types of negotiations. The goal of such an episode is the joint construction of an intersubjective reality that: (1) incorporates or accounts for all the "facts" created together by lawyer and client, including such facts as may be created by the communication of other involved persons who confront our lawyer-client reality; (2) incorporates or accomodates the primary needs, goals, and attitudes of client and lawyer; (3) incorporates or accomodates what the lawyer regards as the relevant potential legal issues and attainable legal goals; and (4) establishes a comfortable, or at least cooperative, working relationship between lawyer and client. If the resulting story is to survive the rigors of the legal discovery process, of bargaining and negotiation (in the adversarial sense), and of litigation, communication strategies must be directed toward establishing its facticity, its coherence, and its common sense quality. It is clear that stories without these characteristics are often subject to losing their status as accepted reality.[14] A story may be "true" in some objective way and yet be rejected as reality during communication in some legal proceeding because it does not meet our common sense standards of typicality, likelihood, comparability, causal texture, tactical efficiency, and so on. Truth is a product of the communication process. A different version of the story may become accepted as reality because it is more easily seen as typical of everyday events, more easily seen as a recognized and understandable type of event, than the story that evolves from our lawyer-client conversation. Or a different version may be accepted because the means-ends behavior patterns it comprises more clearly meet our notions of people's normal tactics in pursuing everyday goals. And, of course, the story must also meet the standards of judgment accepted by the legal system--standards which will be recreated and applied through the communication practices of lawyers, witnesses, judges, and juries. This specific aspect of the interviewing process is mentioned by Hingstman as deserving theoretical guidance and research support: How can the client's view of "what happened" be matched with the lawyer's view of the necessary elements for a legal cause of action without each one distorting the other?[15] How can the confrontation that Hegland calls for at appropriate stages of the interview best be handled, and what points in the episode are the appropriate ones for this confrontation?[16] These are excellent questions and deserve the attention of communication scholars interested in the legal setting, but the scope of our research and theoretical efforts must include not only the interface between everyday and legal realities, but also the processes by which those realities--as meaningful, intersubjective interpretations--are created. For example, consider the problem of lawyer and client designing their messages for each other during an interview episode.

Any utterance that conveys a symbolic act (such as a question, assertion, request, or promise) and that carries propositional content also takes for granted certain states of knowledge held by the participants in the episode.[17] The speaker assumes that some general background knowledge is shared by the intended recipients of the message. Speakers often presume that other participants also share certain more specific foreground knowledge about the topics of discussion, the context in which they arise, and the local situation in which the communication episode is embedded.[18] Utterances are designed to take this shared knowledge into account and build upon it. Recipients of messages, in turn, can usually detect that some knowledge has been presumed and routinely apply their knowledge to the task of creating meaning for the speaker's message. It is not the case, however, that recipients always supply the same knowledge that the speaker intended. Any knowledge that seems to fit can be employed to establish meaning for a message, and different attributions of knowledge usually result in different meanings. For example, a lawyer may ask a question intending to elicit a serious answer. This presupposes that the lawyer actually wants to know the information, that the lawyer assumes that the client has the information, that it is appropriate in the immediate situation for the lawyer to ask and the client to disclose the information, and that the client recognizes these presuppositions.[19] But suppose the client does not recognize that the lawyer actually wants to know (wants a serious answer) or does not regard the disclosure of the information as appropriate in the situation. In that case the client may well give some type of socially accepted ritual response, rather than actually formulating the specific information related to the question. An analogous situation is when your physician asks how you are: Do you say, "Just fine, Doc," or do you reply that you have been experiencing bothersome dizziness for three days? It depends on your definition of the situation and on your attribution of what the doctor wants. The problem is how to design utterances for a recipient (either client or lawyer) when you cannot be sure of what you can take for granted that the person knows or what the person will assume you have taken for granted. Another example would be where the client takes for granted that the lawyer knows certain things about the client's farming business or family history, while the lawyer applies somewhat different knowledge to the task of interpreting the client's utterances. Instances of this sort can slow down the progress of the interview or even result in the construction of a reality that is only apparently shared--lawyer and client may think they are committed to exactly the same story when, it will later be shown, they are not. Communication scholars can provide critical input to the training of lawyers (and other types of interviewers and counselors) and at the same time discover important characteristics of the process of reality creation by a continuing careful study of the communication components of stories and other accounts of reality. This should include both the elicitation and the telling.[20]

A good beginning has been achieved by political scientist W. Lance Bennett who has studied various characteristics of stories and applied the findings to an analysis of courtroom testimony.[21] We should investigate the communication patterns that lead to viable stories in the interactive situation of the interview, which may differ in important ways from what happens in the courtroom. We should also study those communication patterns that lead to weak or unsatisfactory constructions of reality and work out ways of detecting and correcting such patterns during the progress of the interview. Of course, some work has been done on the detection of deliberate deception, but it is not at all clear that lying is the most pernicious problem affecting viable reality construction in legal interviews.[22] If lawyers can be equipped with the skills for real-time detection of those communication patterns that mark uncertainty, confusion, contradiction, inference (as opposed to observation), exaggeration, and omission in the emerging intersubjective reality, they will be in a better position to judge and (if possible) improve upon the viability of that reality. The research needed to identify the relevant patterns and provide for their detectability should include the careful analysis of actual talk during interviews, focusing on the giving and interpretation of accounts.

Up to this point I have referred to the client's problem as a problematic event. One sense in which it is problematic is whether it can be cleared up or redressed through legal channels, whether it can be negotiated or litigated. The client has made some preliminary decisions about this before coming to the interview and these decisions probably involved communicating about the event with friends, relatives, and others. This is a phase of reality construction that communication scholars should study along with the interview itself. Felstiner, Abel, and Sarat describe this phase (as well as the phase of contact with legal professionals) as the transformation of disputes from naming to blaming to claiming.[23] Through the process of naming, events become perceived as injurious (or not); through blaming, they become grievances against some other party (or not); and through claiming they become disputes against the other party (or not) which then enter the legal system or some other set of procedures for resolution.[24] Naming, blaming, and claiming are communication processes through which some particular social reality arises: that the problematic event constitutes a dispute with a cause for legal action, for example. These are processes that we should carefully investigate and clearly understand whether or not they occur in the context of a client consulting a lawyer. The resultant findings would probably illuminate our understanding of the legal interview and many other types of episodes as well.

As researchers, the perspective espoused here directs our attention to the communication processes by which we create intersubjective reality, that meaningful or interpreted reality on the basis of which we mediate most of our important everyday action. The perspective warns us that the facticity or objective quality of the everyday world is not nearly so worthwhile a research focus as is the process by which we produce that quality. We are asked to suspend our belief in the typicality, likelihood, comparability, causal texture, tactical efficiency, and moral requiredness of the everyday world in order to study how people create these properties which they then take as given.

As practitioners, as members of the everyday world, we cannot suspend belief in the common sense view of things. A lawyer (or anyone else) who adopted the belief that the communication of the ongoing episode is not about some past event, but rather creates that event, would be unable to interact smoothly with everyone else who holds the natural attitude of everyday life. So, aside from the possible research benefits that may find application in legal interviewing and counseling, what good is it to the lawyer? I think that the perspective of communication as reality construction can sensitize practitioners to three very useful attitudes about interviewing, counseling, and similar activities. First, people's awareness of the importance of communication itself will be heightened. We must remember that those of us who attend this conference and those who read these proceedings are probably atypical in our commitment to the importance of the communication process in everyday affairs. Most practitioners probably need to be reminded, or even shocked into an awareness, of how profoundly people's use of language affects how things appear to them, and of how the meanings people have do not arise automatically from communication, but rather are interactively and reciprocally arrived at. This perspective stresses the importance of communication more than any other I know of. Second, people will be sensitized to the importance of appearances in everyday life. We are so attuned to the desirability of finding and being our true selves these days that we forget that appearance is all most people have to work with. Certainly, the jury is carefully protected from most influences except the carefully constructed appearances that are produced in the courtroom. Certainly, the lawyer should keep alert to the fact that the client is presenting an appearance (or appearances) throughout the interview. Appearances can be skillfully or awkwardly managed and, perhaps most importantly of all, appearances can be changed. That is, there are alternative appearances which can be created and employed to bring about consensus where before it was not possible, or to replace an unfavorable appearance with a more approved one, and so on. Third, this perspective will sensitize people to the importance of the unsaid. I do not refer here to nonverbal messages, but to all those things we take for granted on the basis of verbal and nonverbal messages. Appearances can be created implicitly through what is presupposed and implied by people's utterances. The unsaid often reflects strong commitment or hides the lack of it, for example. And the taken for granted can be compared to what is said or to itself as a check for consistency.

Thus, what we teach practitioners about interviewing can be guided by even such an extreme perspective as this if we take care not to displace critical elements of the common sense view needed for operating in the everyday world. Pedagogy can be a useful buffer between theory and research, on the one hand, and practice, on the other. It can allow the scholar to make obvious, accepted views of the world problematic in order to discover previously unnoticed relationships between communication and other processes, while allowing the lawyer (or other practitioner) to retain those obvious and accepted views in order to function in the work place. One aspect of everyday reality is so clearly created and maintained through communication, however, that scholars and practitioners alike can function perfectly well by treating it as an accomplishment rather than an established fact. Interpersonal relationships are easy to see as moment-by-moment products of communication. Watzlawick, Beavin, and Jackson have stressed that every message has a relational component, and every time we speak we sustain or alter our relationship with each other.[25]

Interviewing and Counseling as Creating Relational Reality

Hegland clearly sees the importance for the lawyer of establishing a good working relationship with the client, and he specifically discusses trust as a sort of relational confidence between two fellow human beings.[26] Hingstman stresses that the long-term relationship between lawyer and client is one of the major outcomes of adopting the process view of communication, and mentions some of the advantages of being able to rely upon that relationship as a resource for repairing problems that arise in this or that interviewing or counseling episode.[27] In fact, much of both Hegland and Hingstman's discussions of communication between lawyer and client focuses on its relational aspects, and they are no doubt correct that the nature of this relationship has important effects on the communicative process of constructing the reality of the case. Furthermore, according to the perspective that communication is a process of creating reality, these effects are reciprocal.

The relationships among the participants in a communicative episode serve as a sort of context for the interpretation of the messages in that episode. One aspect of the relationship between lawyer and client, for example, is the roles of lawyer and of client. The lawyer is likely to be familiar with both the role of lawyer and of client-as-seen-by-lawyer. This would be less true, of course, at the beginning of the lawyer's career. The client, on the other hand, will often be unfamiliar both with the role of the client and with that of lawyer-as-seen-by-client. Hegland reminds the lawyer to adjust to the client's unfamiliarity with what goes on in the lawyer's office.[28] Thus, while the roles the two participants adopt do provide a context for each to interpret the other's communicative behavior, it is also true that lawyer and client are defining and producing those roles through their communication. In a sense, each "learns how" to act the role as the episode progresses. The exact nature of these (or any other) roles is negotiated by the participants through the communication process: their rights, their obligations, their freedoms and constraints.[29] Roles, of course, can be relatively flexible or relatively rigid, but we must remember that they are created and sustained as flexible or rigid by our communication patterns. Once made workably aware of this through communication pedagogy, practitioners can attempt to establish the kinds of relationships they think will be most beneficial to their clients. The relationship is created interactively, of course, so the lawyer can influence, but not totally control, the roles as played in a particular episode. But as the lawyer acquires more and more skill and increasingly effective communication strategies, it should be more and more possible for the lawyer to achieve the desired relationship. The goal for communication pedagogy in this process should be to give the practitioner the recognition that professional (and, of course, personal) relationships are continuing products of the communication process and then to give the practitioner the skills to guide the establishment of a relationship having the qualities that will facilitate progress toward the professional goals appropriate to the particular situation. What are those qualities?

The appropriate goals for lawyer and client--and therefore the appropriate relationship--may vary somewhat. If we assume, however, that one goal for lawyer-client interaction is usually to help the client understand the options available and make the major decisions about those options (a goal that Hegland deems important), then the lawyer-client relationship must be to some degree a helping relationship, as generally defined in the counseling field.[30] To the extent that the relationship should be a helping one, we know several important qualities that facilitate the client's ability to make and take responsibility for important decisions. These are stated differently by various researchers in counseling communication, but I shall call them empathy, respect, genuineness, and specificity.[31] Empathy is produced by communicating that we understand the other person's point of view and can imagine or appreciate the world as that other person sees it. Respect is produced by communicating a warmth and positive regard for the other as a worthwhile person.

Genuineness is produced by being open and honest with the other about oneself and by operating in fairness with respect to the other. Specificity is produced by dealing with issues on a concrete, practical level and by being clear and accurate in communicating with the other. Helping relationships in which these qualities are communicated at high levels by the practitioner are more effective than other helping relationships.[32] Again, communication pedagogy can provide practitioners with the skills to produce these qualities in relationships with clients.

The key to understanding and coping with relational problems during lawyer-client episodes is to remember the reflexivity in the communication process, as implied by our perspective that communication creates relational (and other) reality. To modify Leiter just a bit on this point, the interpersonal relationship of the participants gives meaning to their talk and behavior, while at the same time, it exists in and through that very talk and behavior.[33] As I have claimed about "objective" reality, each and every utterance retrospectively presupposes an existing relational reality and thereby contributes to the definition of that reality. And every utterance prospectively influences the future possibilities of the participants' relational reality. We create our social world as we communicate our way through everyday life.

Conclusion

If we take seriously the perspective that our everyday reality is continually created by us through the process of communication, we may find some immediate practical applications that will benefit practitioners of legal (and other) interviewing and counseling. But the greater benefit, I believe, is the potential that research will achieve powerful new insights into the dynamics of this type of face-to-face interaction.

Notes

Robert E. Nofsinger is Coordinator of Graduate Studies for the Department of Communications, Washington State University.

[1] James F. Weaver, "Review of Research on Legal Interviewing and Counseling"; Kenney Hegland, "From the Legal Profession: Legal Strategies and Research Needs in Interviewing and Counseling"; and David B. Hingstman, "Legal Interviewing and Counseling: Communication as Process," this volume.

[2] Hegland, this volume.

[3] Hingstman, this volume.

[4] David H. Smith, "Communication Research and the Idea of Process," Speech Monographs, 39(1972), 174-182.

[5] Kenneth Leiter, A Primer on Ethnomethodology (New York: Oxford University Press, 1980), pp. 7-9.

[6] Alfred Schutz, Collected Papers I: The Problem of Social Reality (The Hague: Martinus Nijhoff, 1962), pp. 3-47, 207-259.

[7] Leiter, pp. 200-215.

[8] On the taken-for-granted, see Robert Hopper, "The Taken-for-Granted," Human Communication Research, 7(1981), 195-211.

[9] Elizabeth F. Loftus, Eyewitness Testimony (Cambridge, MA: Harvard University Press, 1979), pp. 112-133.

[10] Leiter, pp. 71-73.

[11] On the presuppositions of speech acts, see John R. Searle, Speech Acts (Cambridge: Cambridge University Press, 1969), pp. 54-71; on the implications of indirect speech acts, see H.P. Grice, "Logic and Conversation," in Syntax and Semantics, Vol. 3: Speech Acts, ed. Peter Cole and Jerry L. Morgan (New York: Academic Press, 1975) pp. 41-58; see also Leiter, pp. 200-215.

[12] Leiter, p. 174.

[13] Leiter, p. 163-165.

[14] W. Lance Bennett and Martha S. Feldman, Reconstructing Reality in the Courtroom (New Brunswick, NJ: Rutgers University Press, 1981), pp. 41-65.

[15] Hingstman, this volume.

[16] Hegland, this volume.

[17] Searle, pp. 54-71.

[18] The term *foreground* is one of four types of knowledge discussed by Rolf Kjolseth, "Making Sense: Natural Language and Shared Knowledge in Understanding," in *Advances in the Sociology of Knowledge*, II, ed. Joshua A. Fishman (The Hague: Mouton, 1972), pp. 63-65.

[19] Searle, pp. 64-71.

[20] Hegland, this volume.

[21] Bennett and Feldman, pp. 41-65, 93-144.

[22] See for example, John E. Hocking and Dale G. Leathers, "Nonverbal Indicators of Deception: A New Theoretical Perspective," *Communication Monographs*, 47 (1980), 119-131; and John Waite Bowers, Norman D. Elliott, and Roger J. Desmond, "Exploiting Pragmatic Rules: Devious Messages," *Human Communication Research*, 3 (1977), 235-242.

[23] William L. F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .," *Law and Society Review*, 15 (1980-81), 631-654, references on pp. 883-910.

[24] Felstiner, Abel, and Sarat, pp. 633-637.

[25] Paul Watzlawick, Janet Helmick Beavin, and Don D. Jackson, *Pragmatics of Human Communication* (New York: W.W. Norton, 1967), pp. 51-54.

[26] Hegland, this volume.

[27] Hingstman, this volume.

[28] Hegland, this volume.

[29] William K. Rawlins, "Negotiating Close Friendship: The Dialectic of Conjunctive Freedoms," *Human Communication Research*, 9 (1983), 255-266.

[30] See, for example, Barbara F. Okun, *Effective Helping: Interviewing and Counseling Techniques* (North Scituate, MA: Duxbury Press, 1976), pp. 16-39.

[31] Okun, pp. 28-34.

[32] Okun, pp. 30-31.

RESPONSES TO LEGAL INTERVIEWING AND COUNSELING PROGRAM

Harvey Burdick: It is the first time I've heard a discussion on legal counseling and interviewing and other kinds of models come to my mind. I think of the medical model of interviewing and the function of that interview on the part of the doctor who is trying to find out something so that he can diagnose the disease and treat it. I think of the therapeutic model of the clinical psychologist who has a relationship with a client where the interview is almost the treatment itself. I think of a teaching model as one who interviews students and who is supposed to lead the student to the truth in some fashion. Or, there is the priest's model when he leads the parishioner closer to God. And maybe there are other models, but those are the ones that come to mind. Is the lawyer model a piece of everything or is it different from everything? Is it a unique model?

Kenney Hegland: All of the above. It is a hodgepodge. I think a part of the legal interview is getting information like a doctor; you need to know what happened. You are also like a teacher, in terms of telling students (clients) you have some kind of knowledge. You also are giving them certain parts of the truth and you're making judgments. You have the same cross to bear as a teacher because you control the information; you manipulate some knowledge. I think that there are many different kinds of models and many different kinds of roles. You find out what the facts are, and then you help the people go from the past facts. There are different kinds of legal interviews too. Most of my own experiences were with past events--divorces, crimes, landlords, that sort of thing versus planning. Most business lawyers do planning and their function is quite different; they are not concerned with past facts as much as they are involved with future facts.

David Hingstman: As I emphasized in my paper, I have difficulties with models that say that lawyers should do such and such. In other words, the lawyer should be a doctor; the lawyer should be a therapist; the lawyer should be a teacher. I think that all of those kinds of models emphasize that you have a certain body of information you have to master in order to even imagine you are competent in interviewing and counseling. It is more useful to look at the situations themselves and decide what is likely to happen in each situation. I suggest that lawyers will tend to doubt their own abilities and may have unreasonable expectations about what they should do; there will be distractions from the environment. Then, when they identify elements of the situation, they will say, "What can I do to adopt or cope with that situation?" What we are saying essentially is the lawyer is an interactor. But, we are all interactors. So, that doesn't tell you very much. Look instead at the situation. What is in that situation? What do I need to do to adapt to the situation?

James Weaver: Your question seems to imply all these other models were very neat, clear, separate and distinct. I think if you look at each one of them, they are a hodgepodge. All of them are alike in certain ways. The legal model can be like the medical model, and yet certain problems exist when trying to relate the medical model to law. As you quickly find out, a lot of the legal interviews really are not dealing with legal problems. This is one of the surprising things. The client may think that there is going to be a legal problem, but there may not be one at all. When there is such a problem, it is the legal expert's job to try to help the client. So yes, the legal interview is like the others, but so are the others like the legal one. A hodgepodge exists.

Gerald Miller: I've attended a number of conferences on social science and the law and communication and the law, some of which have been attended by Marxist sociologists. I've come to the conclusion that a Marxist sociologist is kind of indispensable, even though they tend to be a pain in the posterior for everyone attending the conference. Since I don't think we have a Marxist sociologist here, I'll be the devil's advocate and react to what has been said from that perspective. I think it would be very easy for us to worry a great deal about what kind of interview and counseling model we think is optimal for lawyers and clients. My Marxist postulate would be, given the rotten fiber in which the capitalist legal system is embedded, the typical attorney isn't going to take the time to develop any kind of serious relationship with a client. And the typical client isn't going to have the resources to demand the attorney develop that kind of relationship. If you're fortunate enough to be a continuing counsel for a corporation about their legal matters, where you have contact with a board of directors or president or vice-president for two or three years at a time, that's fine. Or, if you are fortunate enough to be handling the legal affairs of an economically advantaged client, that's fine. But my prediction would be, that for 95 percent of the clients, lawyers aren't going to take the time to develop an interpersonal relationship and clients aren't going to have the economic resources to demand that kind of relationship from the lawyers. It seems to me that if that is a possibility, there are two approaches we can take. One is obviously the Marxist sociologist perspective to drive down the rotten fiber of the system and develop a new set of assumptions to take away the notion that the legal profession is the tool of the economically powerful--just throw the whole system out. The other would be to say, "What can we do to help people do a better job in twenty minutes or a half hour, or forty-five minutes or whatever amount of time gets involved?" When we start talking of the values of developing an interpersonal relationship, we are not viewing things as one-shot operations, but rather working overtime and spending a lot of time drawing out things. I wonder if the participants have any thoughts about whether or not that kind of model really is applicable to some of the interviewing and counseling that goes on within the legal system today?

Vivian Dicks: You imply that attorneys will not take the time. I think that is not true and I would point to two things. First, there is a current call in the legal literature on improved interviewing. Attorneys seem to want to do a better job in this area. The second thing I would point to is that, if you do it better, you can theoretically be more efficient in meeting the goals of the legal interviewer. Lawyers will take the time to establish improved interpersonal relationships so that their time is spent more productively. In other words, the attorney says, "I'm wasting a lot of time because I'm doing a bad job and I know I can do it better." As to whether or not the client will demand it from an attorney, there are a couple of impediments, but they can be overcome. One is intimidation. Clients are intimidated by attorneys. They don't understand the words they are using; they go into offices that are plush or offices that are in chaos; they face a system that they know nothing about and where they have a great deal to lose. High risk and unfamiliarity can be dealt with by the attorney to reduce that problem. When they are dealt with the relationship between attorney and client improves. The other thing that impedes the client is cost. "Everytime I ask a question, is this going to ring the meter up again?" The lawyer who addresses that kind of question might reduce another one of the impediments. I don't think the situation you described is accurate. Take your Marxism back to Michigan State! (Laughter)

Gerald Miller: Let me respond to that because, first of all, it was not meant to be a deterministic statement a Marxist would make and I assume there would be attorneys who are exceptions to the rule. It is a naive credo of faith though to say that a large number of attorneys or a large number of academicians don't spend time in their offices with their students because they have better things to do. It is naive to suggest that attorneys when they start to find their own priorities and structuring their own realities spend much time doing that. I kind of like the answer I'm hearing and it may just be a hang-up I have about what I mean by an "interpersonal relationship." There are probably some strategies such as those you mention which attorneys can use to communicate more effectively even in short time frames. I don't disagree with that. But, lawyers generally don't do the kinds of things they need to do to get the kind of interpersonal relationship that I think would be really insightful. I remain skeptical about that happening, and I'm not sure that articles in legal journals will change them. The way all professionals write in journals about ethics and behavior, and the way the average member of the profession practices it, is often different among academics, doctors, lawyers and every other professional group. But I don't mean to imply no attorney would take the time; there are enough of them that would see that establishing a relationship is no overwhelming problem.

Raymond Buchanan: We have left out of this discussion a segment of practicioners that are very important. It is one thing to talk about people working in civil cases where there are almost unlimited resources, but obviously when you are dealing with a public defender's office or when you're dealing with a prosecutor's office; you are dealing with burdened down people. So, the problem Gerry is talking about is a realistic one. I don't want to rush over the idea of at least trying to figure out how to deal with the problem of trying to compress the process for those haggard and belabored people who are so burdened down because they don't have the time and they don't have the resources. There are thousands of those people out there working in our judicial system. They do need to deal with interpersonal relationships in a different manner from many other lawyers. I don't want us to overlook the recommendation Gerry made that we do need some kind of research on the possibility of compressing the process for those situations where it is necessary to do so. I've worked with public defenders and prosecutors and I know how rushed they are, how their caseloads are such that they simply cannot do the kinds of things that are recommended over long periods of time. We can't compress that process until we find out what the process is. We don't even have the descriptive literature to find out what is happening in legal interview situations. Maybe we would discover that we don't need to compress it at all.

Raymond Buchanan: I agree with you except we do have to recognize that there are significant situations where lawyers don't have years and years to deal with problems. There are times when people do have time and money constraints that indicate they can't go into a lot of detail and a lot of time. Whatever we do, we are going to have to recognize that problem and try to address it.

Joyce Tsongas: I think it is important to make a distinction between lawyers giving legal counsel and lawyers doing counseling. I think we have been a little bit careless about that distinction. When I think of people in litigation, they are under a great deal of stress. The problem is that when the litigator is under stress, his counseling skills, if he has any, are probably not very high. One skill we might focus on is how to give attorneys referral skills when they recognize symptoms in clients and witnesses. They should be able to refer them to counselors when that is needed. I can think of one example of how that is being done in the state of Oregon, and I'm sure there are hundreds of other examples from around the country. In divorce litigation in Oregon, there is a group that uses pairs of attorneys and counselors as teams to separate the legal problems from the personal problems and to try to work through those together. They have a phenomenally high success rate in settling divorce cases and in preventing them from future litigation. That is one skill we can offer, teaching attorneys referral skills when they are no longer in the field of legal counsel and are in a position of needing to refer a client to a counselor.

Keith Griffin: I like the connection between Jim Weaver's overview of variables involved in the interview and counseling process and Bob Nofsinger's comments on the constructional approach in recreating reality. I would offer a phrase, "conscious competence" to unite these two. Building further on what Gerry has said, all of us bring certain communication competencies to our respective jobs. Anyone who is an attorney is going to have a certain number of communication skills. In my own limited work in legal communication, I've found that attorneys do not appear interested in developing "conscious competence." They are interested in how they can win or get the job done. I think what we are dealing with here is the question, "How can we communicate to the attorney a concern for developing 'conscious competence,' in identifying and responding to the communication variables in the client-attorney relationship?"

Leroy Tornquist: I'd like to add some additional objective realities to what Vivian Dicks said about legal education. In legal education, we have been talking about changing it by lowering student faculty ratios. We have also been talking about introducing more in communication in client counseling. But, there are a couple of things you have to keep in mind. First, special courses in legal education are rather new in the last ten or fifteen years. There are many schools where you talk about clinical courses such as client counseling to the academic faculty and they will absolutely do everything they can not to introduce those courses. They will fight against them. It is those kinds of people we need to impress with the importance of communication skills in the practice of lawyering. Secondly, the number of law students that take practical courses within a given law school is small. You may only have 24 students that are able to take the course and 24 students just isn't very many in terms of the total number of students that actually graduate. You need to keep in mind the reality that it isn't enough to say we need to change. I agree that we need to better train lawyers in our society, but it is not quite as simple as we seem to think. We are going into tough times. These courses are expensive courses. As a law school dean, I really have to worry about such courses; they are very expensive and yet very important.

Philip Davis: I suggest that the way to change the law school curriculum is to get to your bar association and explain to them exactly what is going on here and what lawyering is mostly about. Part of the bar examination should be an oral examination. I proposed that to the New Mexico Board of Bar Examiners. It was fascinating to bear Bob Nofsinger talk about intersubjective reality, because their reaction to my suggestion that there be an oral component to the bar was, "How would we grade that? It's so subjective." They virtually rejected it out of hand, even though they acknowledged there are a lot of people who pass the bar who are absolutely dumbstruck when talking to anybody else including their own wives, children, etc. These are many people who don't pass the bar exam who are fantastic lawyers in the classroom. The way to wrench your law schools around is to get the Board of Bar Examiners to say, "Change the way you let people become lawyers!"

LEGAL NEGOTIATING AND BARGAINING

PROGRAM COORDINATOR

RICHARD RIEKE
DEPARTMENT OF COMMUNICATION
UNIVERSITY OF UTAH

PROGRAM CHAIRPERSON

JAMES F. WEAVER
DEPARTMENT OF SPEECH COMMUNICATION
IOWA STATE UNIVERSITY

REVIEW OF RESEARCH ON NEGOTIATING AND BARGAINING: PROBLEMS WITH THE ECONOMIC MODEL AS A BASIS FOR THEORY AND RESEARCH ON NEGOTIATION

David H. Smith

In a television interview several years ago, Harvard economist John Kenneth Galbraith remarked that, prior to 1970, any candidate for a Ph.D. degree in economics who announced that inflation and recession could co-exist would have failed the examination. With the decline of Keynesian interpretations, economists have been unable to describe what has been happening to the economy, tell us what we can do about it, or agree among themselves. Yet the economic model has remained remarkably popular as a basis for theory in social science. It has been used extensively in sociology and social psychology in the attempt to develop a general explanation of human behavior. Because of its nature it has seemed particularly appropriate for the study of negotiation.

This paper will discuss the theory of exchange which is elaborated from the economic model, consider its place in social science theory, comment upon some of the problems with its underlying precepts, and discuss implications of all this for research on negotiation by communication scholars.

Jeremy Bentham begins An Introduction to the Principles of Morals and Legislation as follows:

> "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects are fastened to their throne. They govern us in all we do, in all we say, in all we think; every effort we can make to throw off our subjection will serve but to demonstrate and confirm it."[1]

The notion that people pursue pleasure and eschew pain is deeply rooted in Western thought, but in Bentham's era it became the key to establishing an ethic for human action. One would do and should do that which would maximize utility.

For Adam Smith, in this same era, utility was value in use as opposed to purchasing power which was value in exchange. It was through money that utility was translated into a basis for exchange.[2]

From these fundamental notions the modern view of the economic human, choosing the most profit at the least cost, has evolved. Economic or rational persons have sets of values or utilities of which they are aware. Through the process of exchange they attempt to maximize those values, receiving the most of what they want at the least cost to themselves. They behave best when they behave purposefully, consistently and, hence, rationally.

These rational persons, who know what they want in advance and behave so as to get the most of it they can, have been appealing not only to the economist. They have made their way into the social science literature generally through exchange theory.[3] In sociology the theory of exchange is widely associated with the work of George Homans[4] and Peter Blau.[5] Thibaut and Kelley apply the notion of exchange to the formation of dyadic relationships in groups.

> The point should be made, however, that whatever the gratifications achieved in dyads, however lofty or fine the motives satisfied may be, the relationship may be viewed as a trading or bargaining one. The basic assumption running throughout our analysis is that every individual voluntarily enters and stays in any relationship only as long as it is adequately satisfactory in terms of his rewards and costs.[6]

For Thibaut and Kelley, action is determined by the comparison levels of alternatives, Clalt. This Clalt notion has been borrowed by others, among them Caplow who uses it in Principles of Organization.[7]

The rationality notion with its emphasis on a priori purpose has also found its way into theories of management and administration. Here it is expressed in rather elaborate schemes for planning, which give rise to PERT charts, decision trees, computer modeling and simulation.

A number of writers have used the rationality idea to discuss interpersonal relationships more specifically. Carson describes interpersonal relationships as negotiated, resulting in contractual arrangements, including such noncommercial commodities as "satisfaction and security" which he argues exhibit many of the same properties as commercial commodities.[8] Roloff argues that

> "Interpersonal communication is a symbolic process by which two people, bound together in a relationship, provide each other with resources or negotiate the exchange of resources."[9]

Miller and Steinberg suggest that human communication is "'all about' controlling the environment so as to receive certain physical, economic or social rewards from it."[10]

Villard and Whipple use the term "relational currency" to dramatize the economic base of their view of relational communication.

> "Our selection of the monetary concept of currency is not a chance selection, for indeed interpersonal relationships involve not only an *investment* in terms of ourselves as well as our limited time and energy, a *transaction* or trade in some currency that we will describe as intimate or economic, but also a degree of *risk taking*, which may involve loss of investment, lack of support for our identities, and, perhaps, even a conscious misrepresentation of currency value."[11]

Knapp sees the ongoing assessment of rewards (or favors) and costs as the basis for moving in and out of relationships.

> For any given encounter, you might assess the rewards and costs and ask yourself whether the rewards were greater than the cost. Naturally, the greater the ratio of rewards to costs, the more satisfied you are with the relationship."[12]

Wilmot cites Altman and Taylor in arguing that "perceived rewards and costs govern the development of relationships."[13] In describing the termination of relationships he explains, "Often you find someone else who 'fits' better--who shares more of the same values, responds more fully to you as a person, and generally provides more rewards."[14] Thus all relationships may be viewed as negotiated. Talk becomes the process through which communicative transactions are developed.

The idea that people seek pleasure and eschew pain is a good fit with the concept of reinforcement in behavioristic psychology, particularly when profit is seen as reward and loss is seen as punishment. Hence, the economic model and the dominant psychological perspective in the twentieth century have shared an underlying commonality. Their notion of the base of human behavior has been similar. It is not surprising, then, that exchange based on rationality should have become a popular base for explanations in social science in general and in communication study in particular.

It was from economics, once again, that the theory of games developed, particularly as a means of solving the bilateral monopoly problem. Game theory has also proved widely popular in the social sciences. It seems to provide a way of describing bargaining transactions. Numerous studies of negotiation have been carried out based upon the game theory paradigm. Indeed, a whole social psychology has developed from one particular variety of game, the Prisoner's Dilemma Game.

Game theory, of course, takes the most rational decision as its objective. It assumes that players know all the values associated with all possible outcomes, both for themselves and for the others in the transaction, before any choices are made. Further, these values are comparable on a single scale, often an interval scale. Laboratory research can thus be carried out without the confounding difficulties involved in allowing subjects actually to talk to each other.

Critiques of game theory are not new. The absence of the opportunity for subjects to communicate has been a particularly important limitation from the view of communication scholars. The problems addressed below, however, though applicable to the theory of games are not specific to game theory, but rather apply to the whole concept of economic-rational man as outlined above.

The fundamental problems with the rational view stem from the basic assumptions themselves. The first is that we have goals or motives in advance of behavior. There is an attractive contrary body of thought which argues that it is only in behaviors that meaning and purpose are discovered, and, that goal-like statements are created after the fact to explain behavior. In this view one's goals can be found only after the behavior itself has been executed.[15] If purpose is not a prori then neither behaviors nor bargains can be chosen on the basis of purposes.

A second objection to the rational view is that even if motives exist prior to acts, they cannot be ordered and compared. Human beings are thus viewed as having only general notions about desired future states. Some of these desires are incompatible and, perhaps, in conflict. These conflicts are not problematic, however, because the possible events seldom present themselves in the same field. Salience and, perhaps, certain accidental factors rather than greatest utility determine what behavior is enacted.

Each of us is likely to have a number of items he/she would like to purchase. The one that is actually bought may be determined by the appearance of a salesman at the door, by a particularly favorable price or attractive color, or by the suggestion of some friend. Utilities would seem evanescent indeed if they are modified as rapidly as necessary to explain examples of this kind.

Most of us want incompatible future states. We want to work fewer hours and publish more books. When two such objectives become simultaneously salient, we will experience considerable conflict. We may be able to handle the conflict only by withdrawing from the situation demanding choice. Inconsistent, doubt-filled, ambivalent behavior is a poor fit with a model describing man as possessing an ordered set of utilities.

Further, the rational person is presumed to possess a dimension on which widely differing phenomena can be compared. Such a human can compare a desire to be alone, the attractiveness of a new automobile, a fondness for artichokes, and a belief in human dignity, on a single scale. Money provides a useful scale on which to compare items for purchase, but as difficult as it is to find consistency in the way we actually use money, it seems impossible to find any scale on which sentiments and beliefs can be compared with whims and needs.

Third, in applying rationality to bargaining behavior not only must we assume that individuals know their own utilities and are able to order them, but that they have a complete knowledge of the utilities held by others and the ordering the others place on those utilities. Further, that knowledge extends not only to past possibilities, but to all known alternatives and unknown alternatives which might emerge as part of the process of bargaining itself. We know in advance how we and others will value all possible options. For those of us who find it difficult enough to know what we want to order for breakfast, such omniscience seems unlikely.

Fourth, there is a fundamental tautology underlying the rationality principle. If people behave so as to maximize their utilities, we have both a predictor and an explainer of behavior. But what happens when, as we commonly do, we notice an individual behaving in a bizarre fashion. We ask how the person can engage in such obvious self-destruction. If the individual is maximizing utility, surely such acts would not be performed.

In order to save the utility concept in face of such a question, we can stress its subjectivity. We can say that although the external observer is not able to understand the values being assigned by the individual performing the act, the act does indeed have greater utility. Regardless of how it might appear to those who merely watch, this self-destructive behavior appears to the one doing the behaving to have greater utility than any other alternative.

Having thus allowed the introduction of individual subjectivity into the valuing of utilities, we are now in the position of saying that the individual behaves in this way because of the assignment of greater utility. How do we know that the behavior executed has greater utility? Because the individual has executed the behavior. We are in a conceptual circle. We know the individual behaves because the act has high utility and we know the act has high utility because it is the behavior.

If utilities are not subjective, then man does not always behave so as to maximize utilities. But if we introduce a subjective element to account for self-destructive behavior, we are caught in a tautology. We have an explanation which is no explanation at all.

Because of these weaknesses in the assumptions underlying the rationality notion, that view has come under increasing attack. Indeed, the economic model has become unsatisfactory even for economics itself. Many economists have come to regard the idea of a grants economy, where gifts are bestowed with no prospect of exchange, as necessary for the explanation of how a capitalist economic system operates. Kenneth Boulding's book, An Economy of Love and Fear, is, perhaps, the best known work of this kind:

> "On the whole, economists, as well as other social scientists, have concentrated heavily on the concept of exchange in describing social relationships in the organization of society, and they have regarded the one-way transfer, or "grant", as exceptional and apart from the general framework of economic or social theory. This focus is unfortunate, for not only is the one-way transfer a significant element in social life, but it is an element whose importance has been growing rapidly in the twentieth century. Today, for instance, according to various possible definitions, we could say that from 20 to almost 50 per cent of the American economy is organized by grants rather than by exchange."[16]

Even if there are problems with the general theory of rationality, surely one might argue, it still provides an excellent fit with negotiation theory. Negotiations do, after all, seek to establish bargains and transactions. They epitomize exchange. At least in the negotiation context, one might argue that such a theory, based on the human being who maximizes utility, would provide an excellent approach.

Yet there are some particular problems with the application of exchange theory to the study of bargaining and negotiation. If the pre-existence of purpose (goal, value, utility) is problematic, then viewing negotiation as a process of discovering what is the best settlement one can achieve is problematic as well. The concept of "best settlement from one's own point of view" becomes almost impossible to operationalize if values are not known in advance.

Ikle and Leites set out a model of the negotiation process arranged around a set of mutually exclusive alternatives which constitute the bargaining range. Within that larger range, each party is assumed to have a somewhat smaller range which constitutes acceptable settlements. The point beyond which a given party is unwilling to go is the minimum disposition point. Bargaining, then, becomes, the attempt to settle as close to the opponent's minimum disposition point as possible.[17] But, of course, if utility values are not ascribable in advance in this ordered way, then bargaining can hardly be viewed as the process of discovering how close one can settle to a minimum disposition.

Some years ago the author conducted a series of experiments designed to identify and manipulate the bargainers' minimum dispositions. When bargainers were asked to name their own minimum dispositions, fully 25% of the answers were impossible given the nature of the bargaining problem and the bargaining behavior that had been exhibited. When attempts were made to manipulate the subjects minimum dispositions as an independent variable, a substantial number of the subjects settled beyond the minimum disposition point. When they were interviewed they revealed that they were unable to adopt minimum disposition points in advance of bargaining experience. It is, of course, possible that the experiments were inadequate in design and execution. It is also possible, however, that the concept of minimum disposition itself owes too much to the rational view of man to be useful in communication research.

Beyond the notion of the minimum disposition itself is the set of additional arguments which view the negotiation process as one of discovering the opponent's minimum disposition point and, at the same time, disguising one's own minimum disposition. In that way, strategy and tactics can be used to move the settlement as close to the opponent's minimum disposition as possible.[18] This is a particularly attractive argument for those in communication because it centers on the communication of information. But, of course, it assumes that each party knows the values associated with the range of possible settlements in advance so that that information can either be concealed or revealed. If, in any negotiation, a whole series of issues is at stake it becomes exceptionally difficult for an individual to combine these on one scale so as to attribute value in any kind of ordered manner. Kenneth Boulding is again useful here. In considering the state of conflict theory and research, he argues:

> "Even if people knew what their interest was, they would find it extremely difficult to act on it, so that the actual dynamics and changes in the distribution, both of power and of human welfare, are the result of vast misunderstandings and confusions about the actual effects of particular actions, and very little the result of rational choice."[19]

Game theoretic explorations into bargaining behavior assume that all possible outcomes as well as the values associated with all these outcomes are known in advance for both parties. As indicated above this assumption is fraught with difficulty. Consequently, game theory is of limited value in studying bargaining behavior. If we cannot predict in advance the values that parties will assign to a bargaining problem, then our ability to carry on research based upon the economic model is extremely limited.

There are other aspects of negotiation with which we have difficulty from the exchange point of view. Even in the simplest bargaining problem, a relationship develops between the human beings engaged in the transaction. The nature of that relationship influences what happens. Some bargainers become friends. Indeed, those who bargain as representatives of larger constituencies often develop certain understandings, norms, and expectations quite independent of the interests of those they represent. These may have a dramatic influence upon what will happen in the bargaining process.

Further, profesional bargainers develop reputations in the community of negotiatiors. Some attorneys have reputations as especially tough bargainers who will go to trial rather than make substantial concessions. Others may be seen as "pushovers," easily threatened. The relationship from previous encounters affects the relationship in a current one. The desire to maintain the relationship to facilitate future encounters may influence bargaining in the current encounter.

Bartos explains the strong norm for fairness as a requisite for successful negotiation. He argues that negotiations are more likely to be concluded successfully when concern that the settlement be fair to both parties is maintained by both parties. Such behavior hardly seems consistent with the view of bargainers as maximizing utility.

> "Most rigorous theories of negotiation start from the assumption of individual rationality: each negotiator is trying to maximize his own payoff (utility). ... While this approach leads to various elegant solutions, we feel that it is based on some (to us) unresolved conceptual difficulties. ... In fact we believe that negotiations proceed smoothly only as long as they are guided by the collectivist desires for fairness; that problems arise whenever the individualistic motivations take over."[20]

Winham and Bothis report that, in a foreign service simulation of international negotiation, this norm for fairness or reciprocity was a powerful explanation of the results. "Rather than utility maximization, the FSI participants appear to have been motivated by some notion of fairness, equal division, or egalitarian norm of reciprocity".[21]

Concern that the other be fairly treated is only one dimension of a relationship that can form between bargainers, particularly if those bargainers continue to treat with one another continuously or intermittently over time. The notion of a "mature collective bargaining relationship" frequently mentioned in labor relations in the United States recognizes the existence of such on-going relationship factors.

If we decide that proceeding from the rational-economic view is limiting in our study of negotiation, what are some of the options that might be available to us? One option is to use notions with which communication people have felt comfortable for a long time.

We can look at the talk that takes place in negotiation itself. We can seek process rather than structural explanations for negotiation. We can take what is said at face value. What talk is associated with what kinds of bargaining and what outcomes?

A number of studies have used some means of counting types of comments as a way of looking at communication in bargaining. Among the more recent are Putnam and Jones' revision of the Bargaining Process Analysis categories,[22] and Donohue's rule-based scheme.[23], [24] Such interaction analysis systems typically record statement type rather than statement content. They, hence, tell us about the structure of the discourse.

Beyond such structure is the meaning assigned to the talk by the negotiators. We might well stress the notion of meaning creation in bargaining. How is it that parties to negotiation begin to assign meaning to what happens in the bargaining and to the possibilities for settlement?

We might view the bargaining process as one of mutual exploration in which the parties seek definitions of issues and experiences. We might examine the talk in negotiation as a process through which values and meanings emerge which can be shared by negotiators. Conversation or argument rather than serving the role of conveying information or implementing strategic acts could be analyzed for the ambiguity or clarity of definitions and for the similarity of meaning assigned to important symbols by the parties.

Zartman argues that, rather then seeing settlements as the product of converging concessions, we should see negotiation proceeding in the attempt to generate some larger formula on which general agreement can be based. When that formula is found the settlement is then developed in increasing detail to apply to all matters under consideration.[25] One might substitute the word "metaphor" for "formula" and still be consistent with Zartman's notion. If a metaphor or an image of the settlement can be developed by the parties then that metaphor can be made increasingly specific through the definition and meaning emergence activity of talk itself.

Schlenker and Bonoma point out that the failure of students in laboratory prisoners' dilemma games to follow the rationality postulate stems from their assigning different meanings to the structure of the game itself.[26] The study of the act of meaning creation in the negotiation process seems a sensible one.

Another approach at least as venerable and familiar in communication study is the regarding of communicative acts as persuasive. One can study the influence process by regarding comments in bargaining as persuasion. Bargainers make what appear to be arguments. Some of these are likely to be more influential than others. Putnam and Jones in their review of the study of communication in bargaining cite several studies that have approached negotiation as debate or persuasion.[27] Stevens argues that persuasion is an important part of the bargaining process.[28] Lang and Wheeler, in addition to noting the importance of the fairness idea cited above, indicate the usefulness of face-saving arguments.[29] Stevens calls arguments of this kind "rationalization," by which he means the supplying to the other arguments that can be used to justify settlement terms to the constituency.

Neither the explanation of meaning emergence in bargaining nor the assessment of persuasive strategies is grounded in anything like the general elegant theory of rationality. Yet the rationality hypothesis has such serious difficulties that it is being called into question both outside of economics and within the field of economics itself. The problems have particular importance for the study of bargaining and communication. Zartman argues that "The problem is not one of identifying the wrong processes, but rather of assuming away all the interesting elements that make the process work and would make it understandable."[30]

It would be nice if we had as a substitute for the economic view of behavior an equally appealing general and elegant theory. Unfortunately no similiar paradigm seems available. We, nonetheless, can proceed to do the best we can with the constructs available to us. And for communication people, that means looking at the traditional communication variables, rather than attempting to borrow non-communicative constructs as explainers.

Kinder and Weiss, in reviewing three books on decision making, conclude by summarizing where we find ourselves in the study of negotiation as well as of other means of decision making.

> "Thus we have moved beyond the artificial structure of rational models, clean and elegant as they may be, and landed in a morass of partial theories, component processing tasks, and ill-specified contingencies. The analytic paradigm is not about to be eclipsed by a well integrated vision of decision making. After all, it has been entrenched in Western thought for centuries. But progress is being made, measured not in the triumph of some new improved ideology of decision, but rather in the emergence here and there of pockets of understanding of the unvarnished enterprise of choice. Between the complexity of the human mind and the diversity of the painful decisions we confront, the study of decision making takes on questions of enormous difficulty. To recognize this should lead us not to despair, but to eclecticism, flexibility, and modesty."[31]

If problems with the economic model limit our understanding of negotiated decisions where exchange appears, at least on the surface, to be such an obvious fit, what of the application of the economic model to other communication set tings, particularly interpersonal relationships? If negotiators have difficulty assessing the utilities associated with various outcomes, if they have difficulty arranging priorities among outcomes, if they have limited information about the utilities and priorities of other negotiators, it is hard to imagine that interpersonal relators or communicators generally would not be similarly limited. Hence those approaches to interpersonal communication which rely on rational, economic explanations for behavior in relationships suffer the same limitations as bargaining theories which rely on rationality. Other notions of the term "relationship" may be required. Other explanations for the behavior of individuals in groups and organizations may be also necessary.

The view of man as a utility calculator is venerable, but the requirements it places do not seem to fit ordinary experience. Communicators who are ambivalent, conflicted, vassilating, inconsistent, unsure of what to say, confused upon reflection as to whether they said what they wanted to say, and often desirous of altering relationships, would seem poor calculators. Hypothetical constructs about the contents of "the black box" work only when they can account for the world of experience. Perhaps we should seek other constructs that better fit our experience.

The idea of exchange and the economic model of man as rational are deeply rooted in Western thought. They have provided a basis for much productive work. It would be foolish to dismiss them. At the same time limitations in their fundamental notions limit their application to communicative behavior in general and to negotiation in particular. Communication scholars would be well advised to examine alternative explanations of individual acts and to seek additional metaphors for communicative relationships.

FOOTNOTES

David H. Smith, Ph.D. is Professor of Communication and of Comprehensive Medicine, and Chief of the Division for the Study of Human Values in Medicine, the University of South Florida, Tampa, Florida.

[1] Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation," 1789, rpt. The English Philosophers from Bacon to Mill, Edwin A. Burtt, ed. (New York: Random House, 1939) p. 791.

[2] Adam Smith, The Wealth of Nations (New York: Dutton, 1957, 1910)

[3] Kenneth J. Gergen, The Psychology of Behavior Exchange (Reading, Mass.: Addison-Wesley, 1969)

[4] George C. Homans, Social Behavior: Its Elementary Forms (New York: Harcourt, Brace & World, 1961)

[5] Peter M. Blau, Exchange and Power in Social Life (New York: John Wiley & Sons, 1964)

[6] J. W. Thibaut and H. H. Kelley, The Social Psychology of Groups (New York: Wiley & Sons, 1959) p. 37.

[7] Theodore Caplow, Principles of Organization (New York: Harcourt, Brace & World, 1964)

[8] Robert C. Carson, Interaction Concepts of Personality (Chicago: Aldine, 1969)

[9] Michael E. Roloff, Interpersonal Communication, The Social Exchange Approach (Beverely Hills: Sage, 1981) p. 30.

[10] Gerald R. Miller and Mark Steinberg, Between People (Chicago: SRA, 1975) p. 64.

[11] Kenneth L. Villard and Leland J. Whipple, Beginnings In Relational Communication (New York: John Wiley & Sons, 1976) p. 141.

[12] Mark L. Knapp, Social Intercourse: from Greeting to Goodbye (Boston: Allyn & Bacon, 1978) p. 29.

[13] William W. Wilmot, Dyadic Communication, 2nd ed., (Reading, Mass: Addison-Wesley, 1979) p. 146.

[14] Ibid., p. 168.

[15] L. C. Hawes and D. H. Smith, "A Critique of Assumptions Underlying the Study of Communication in Conflict," The

Quarterly Journal of Speech, 59 (December 1973), 423-435.

[16] Kenneth E. Boulding, *The Economy of Love and Fear* (Belmont, Calif.: Wadsworth, 1973), 1-2.

[17] F. C. Ikle and N. Leites, "Political Negotiation as a Process of Modifying Utilities," *Journal of Conflict Resolution*, 6 (March 1962), 21.

[18] D. H. Smith, "Communication and Negotiation Outcome," *Journal of Communication*, 19 (September 1969), 248-256.

[19] Kenneth E. Boulding, "Future Directions in Conflict and Peace Studies," *Journal of Conflict Resolution*, 22 (June 1978), 352-354.

[20] O. J. Bartos, "Simple Model of Negotiation: A Sociological Point of View," *Journal of Conflict Resolution*, 21 (December 1977) 565-579.

[21] G. R. Winham and H. E. Bovis, "Distribution of Benefits in Negotiation," *Journal of Conflict Resolution*, 23 (September 1979), 420-423.

[22] Linda L. Putnam and Tricia S. Jones, "Reciprocity in Negotiations: An Analysis of Bargaining Interaction," *Communication Monographs*, 49 (September 1982), 171-191.

[23] William A. Donahue, "Development of a Model of Rule Use in Negotiation Interaction," *Communication Monographs*, 48 (June 1981), 106-120.

[24] William A. Donahue, "Analyzing Negotiation Tactics: Development of a Negotiation Interact System," *Human Communication Research*, 7 (Spring 1981), 273-287.

[25] I. W. Zartman, "Negotiation As a Joint Decision-Making Process," *Journal of Conflict Resolution*, 21 (December 1977), 619-638.

[26] N. R. Schlenker and T. V. Bonoma, "Fun and Games," *Journal of Conflict Resolution*, 22 (March 1978), 7-38.

[27] Linda L. Putnam and Tricia S. Jones, "The Role of Communication in Bargaining," *Human Communication Research*, 8 (Spring 1982), 263.

[28] C. M. Stevens, *Strategy and Collective Bargaining Negotiation* (New York: McGraw-Hill, 1963)

[29] R. J. Leng and H. G. Wheeler, "Influence Strategies, Success and Way," *Journal of Conflict Resolution*, 23 (December 1979), 655-684.

[30] I. W. Zartman, op. cit., 624-638.

[31] D. R. Kinder and J. A. Weiss, "In Lieu of Rationality," Journal of Conflict Resolution, 22 (December 1978), 733.

FROM THE LEGAL PROFESSION: LEGAL STRATEGIES AND RESEARCH NEEDS IN NEGOTIATING AND BARGAINING

© 1983 by Norbert S. Jacker*

I. INTRODUCTION

A. Objectives of Negotiations.

Negotiations can be defined as communications with another designed to arrive at settlement, agreement or compromise. Negotiations are frequently used as a means of resolving differences or as an element in other means of resolving differences, such as litigation, arbitration and, in rare instances, war.

Generally negotiations conducted by a lawyer are conducted on behalf of a client; a fact which raises questions of the lawyer's authority, duty to his client and his professional responsibility as determined by applicable codes of professional responsibility, court decisions and rulings of disciplinary commissions. Negotiations are used in most areas of the law, including labor law, civil and criminal litigation, real estate transactions, dissolution of marriage, financial transactions of every kind, acquisitions and mergers, and commercial transactions.

B. Types of Negotiations.

Negotiations may be categorized in terms of the relationship of the parties involved. In selecting the strategy to be used in the negotiation, the lawyer must consider the relationship between the parties, so that the strategy selected does not operate against his client's interests.

One type of negotiation is the constructive negotiation in which the parties intend to work together afterwards, for example, the formation of a partnership, the negotiation of an employment contract or the establishment of a banking arrangement. Good will and a spirit of cooperation in such transactions are extremely important to ensure a harmonious future relationship between the parties.

Another type of negotiation involves parties who have had a relationship that has deteriorated and who seek the dissolution of that relationship, for example, dissolution of marriage, dissolution of a partnership, or the termination of other contractual relationships. In such negotiations there is often strong hostility between the parties. Such hostility, however, should not extend to the lawyers representing the parties.

A third type of negotiation involves parties who neither have had past dealings nor anticipate future dealings with each other, for example, personal injury actions arising out of accidents.

A fourth type of negotiation has some of the characteristics of each of the first two types of negotiations described above, for example, labor negotiations in which, by tradition, there is a certain degree of animosity and tension, yet both labor and management realize that they must ultimately work together if either of them is to achieve its objectives. The spirit of cooperation in such negotiations is usually significantly less than it is, for example, in a merger negotiation between two corporations. Furthermore, societal expectations are such that a bargaining session in labor negotiations might be looked upon with suspicion by both parties if conducted in too amiable a manner.

II. PREPARATION FOR NEGOTIATIONS

A. Information Gathering.

It is necessary for the proper conduct of the negotiation for the lawyer to gather information about the transaction, her client and the client's objectives, the other side and their objectives, the other lawyer and the applicable law. Such information may be obtained from her client, statements made and documents issued by the other side, government agencies, witnesses, and even from the other lawyer. The use of open-ended questions and active listening both before and during negotiations can be fruitful sources of information.[1] Some information must be given to get information. However the lawyer must not reveal information which the applicable code of professional responsibility provides may not be revealed.

Whenever possible, the client should participate in decisions as to who should conduct the negotiations and how they should proceed. The agreement of the client on these decisions is essential to a successful negotiation. Such agreement is facilitated by a thorough review of the various alternatives and an explanation of the basis for the lawyer's recommendations.

B. The Negotiating Team.

The lawyer must decide whether other people, such as other lawyers with expertise she may not have, and (depending upon the subject matter of the negotiation) accountants, investment bankers, doctors, engineers or other experts, in addition to the client, should be on her negotiating team. The lawyer should allocate responsibilities among the various members of the negotiating team.

In preparing for a negotiation, practice negotiation sessions with role playing in which some of the team members play the role of the other side, can be very helpful, particularly if the lawyer plans to have one or more members of his team with whom the lawyer has not previously worked present at the negotiation. Such practice helps the lawyer to anticipate objections from the other side and to answer them and to use the expertise of his team members effectively during the negotiation. At such practice sessions several different negotiating techniques may be tried to enable the lawyer to discover those with which he is most comfortable and which are most effective.

C. Obtaining Authority To Negotiate.

Complete authority to make an agreement on behalf of the client is not necessarily desirable. The need to obtain authority from the client provides the lawyer with an opportunity to discuss and carefully consider all aspects of a proposal before agreeing to it or making a counter proposal.

Much useful information can be obtained and given at a negotiating session even in a situation in which one of the lawyers does not have authority to make an agreement. In such a situation, to avoid any misunderstandings the lawyer should make her limited role clear to the other lawyer at the beginning of the session. In most contract negotiations the lawyers are not authorized to bind their clients, but are only endeavoring to draft an agreement for submission to their respective clients for their approval or changes.

When multiple issues are being negotiated, it is generally wise to make clear to the other side that an agreement on any issue is subject to satisfactory resolution of the unresolved issues. Due to the interrelationship among various provisions of an agreement, even issues that appear to be settled may have to be reopened and renegotiated in light of the unresolved issues. Where only one issue is the subject of the negotiation, such as how much money one side is to pay to the other, it is easier to obtain advance authorization from the client than it is where multiple issues are to be negotiated.

A lawyer should always try to obtain the best possible deal for his client. However, the knowledge that a client has authorized the payment of a large sum of money often adversely affects a lawyer's ability to drive a hard bargain on behalf of his client. Often better results can be obtained when the client sets tight limits which might be changed as the exigencies of the negotiation require. Such tight limits permit a lawyer to respond with honesty and conviction to a settlement demand by the other side which is in excess of the low limits initially set by the client.

The determination of the maximum or minimum acceptable position is a judgment that properly should be made by the client and not by his lawyer. A client who is highly sophisticated may not need much assistance in setting negotiation limits. The lawyer can be very helpful to clients who have not had much experience in matters of the kind being negotiated by giving them information useful in establishing a maximum or minimum. A consideration of the cost of the alternatives helps the client to determine the maximum that he is willing to pay or the minimum he is willing to accept in the transaction being negotiated.

D. Time, Place and Mode of Negotiations.

The choice of the mode of negotiation depends upon the nature of the transaction and time and financial constraints. Generally it is preferable to conduct negotiations in person. This mode of negotiation permits the parties to exchange non-verbal cues and to immediately respond to objections and correct misunderstandings. Negotiation by telephone is less preferred, since many of the non-verbal cues that in person negotiation provide, are lacking. Negotiation by correspondence eliminates all non-verbal cues and the ability to immediately correct misunderstandings. Such mode allows time for each party to explore other alternatives before responding to the proposals of the other side. Depending upon the situation, this can either be an advantage or a disadvantage.

When and where the negotiations are to be held is often itself a subject of negotiation. Many people believe that they have a significant advantage in having the negotiations held in their own office--they are on home territory, secure and comfortable there. They know the facilities and they believe that having the other people come to them shows that they have more power and are in control of the situation. However, there are advantages to negotiating in the other lawyer's office. Very rarely do meetings take place without some interruption, which in the host lawyer's office may be more disruptive to the host than to the visitor. Another advantage of meeting in someone else's office is that the visiting lawyer can attain greater control of timing because he can always return to his office when he desires to end the negotiation session, whereas, if he were in his own office, it would be more difficult to end the session by asking the other lawyer to leave. The physical environment in which the negotiations are conducted has an influence on the results, for it affects the behavior of the negotiators.

The decision as to whom the lawyer brings with her to the negotiation sessions is dependent upon many factors such as, what members of her team are available, who will be there from the other side, what topics are to be discussed at that session and where the meeting is to be held. Rarely is it desirable to bring the whole team. If the topics to be discussed do not involve the expertise of certain of the team members, it would be a waste of their time and of the client's money for them to be present. The decision as to whether the client should be there will depend, in part, on the degree of sophistication of the client concerning the subject of the negotiation and the relationship between the parties. If the client is not present, the lawyer can use some negotiating tactics which could not be used if the client were present. The team leader should determine in advance how the team members present at the session are to participate.

In setting the time of day at which the negotiations are to be held, the lawyer should consider his biological rhythm and attempt to negotiate at a time when he functions best. Selecting the date on which the negotiation session is to be held depends upon whether there is a deadline which must be met, and, if so, what that deadline is. The more pressure someone who must reach agreement is under, the greater the advantage to the other side. If the lawyer knows that the other side must make a deal by a certain date, then, generally speaking, he becomes more advantaged as that date approaches. The other side must concede more and more to meet their deadline. If they have invested substantial time and effort in the discussions and negotiations, they may decide that it is preferable to accede to some of the demands rather than lose everything and start over again with someone else. Further, if the deadline is very near at hand, there might not be sufficient time to negotiate a deal with someone else. It is usually unwise to disclose deadlines unless they are obvious from the context of the transaction. It is best to appear to have flexibility regarding time, thus giving the impression that if this deal does not work out there is plenty of time to find an alternative.

III. NEGOTIATION STRATEGIES

A. Opening and Closing Negotiation Sessions; Agenda.

Before beginning a negotiation, the lawyer, her client and the other team members, should set objectives for the overall transaction and should develop a plan as to how those objectives are to be achieved. In addition, prior to each negotiation session, the lawyer should determine her objectives for that particular session. Those objectives should be stated at the first negotiation session.

Also at the first session, introductions are in order and the opportunity to learn more about the other lawyer should be taken. By mentioning the names of friends or acquaintances, the lawyers may find that they have friends in common from whom they may later learn more about each other. The existence of shared friends can promote trust between the lawyers and thus make it easier to negotiate. The lawyer can gather some information at the beginning of the session before she actually begins the negotiations. Questions such as, "Tell me, what do you see as our objective?" or "What does your client want here?" might be posed.

An agenda--the order in which the items to be negotiated will be considered--is essential to a negotiation. At the negotiation meetings, an agenda promotes efficiency. Giving an outline agenda to the other side, helps them get organized to the viewpoint of the person proposing the agenda. However, such an outline agenda gives away some information to the other side. A more detailed agenda will help the person proposing the agenda to be sure that all her points get covered. The lawyer whose agenda is used will often be able to control the meeting through the use of her agenda. Sometimes the document being negotiated suggests a logical agenda. For example, the sections of the document may be considered in the order in which they appear in the document. Other agenda might place minor items before major items, or the reverse; or they might place items as to which agreement appears likely before more difficult issues, or the reverse; or they might group together items of similar subject matter, such as all provisions relating to real estate, irrespective of the order in which they appear in the agreement.

An agenda may be informally adopted by tacit consent, or, as sometimes happens in international negotiations, the agenda may be a formal written document which itself becomes the subject of extensive negotiations. Whether formal or informal, there must be agreement on the agenda if the negotiations are to proceed in an orderly fashion.

As a negotiation proceeds, it is helpful, from time to time, to state the areas of agreement and the areas in which no agreement has as yet been reached. Sometimes the matters at issue become obscured. Whenever this occurs, the issues should be clarified. Often this is best accomplished by one of the lawyers simply stating what she believes the issues to be. If the other side agrees, they can begin to discuss the issues. If the other side does not agree, there may have to be a discussion until both sides are in agreement as to what is the issue to be negotiated. Once that is settled, the negotiations can begin or be resumed.

At the close of each session it is useful to summarize what has been accomplished and what is yet to be done. If any statements are made indicating agreement on any points, it should be made clear whether the lawyers are agreeing on behalf of their clients; or, as is more typically the case, whether there is agreement on language or concepts subject to each of the clients' approval. At the close of each session, the lawyers should set the time and place for the next meeting or the manner in which the next meeting will be set.

B. Strategies and Tactics.

1. Cooperative problem solving.

A cooperative approach to problem solving occurs where the lawyers on both sides of the transaction, recognizing their respective client's objectives, endeavor in a cooperative manner to meet the needs of both clients. This approach often produces excellent results. It is especially useful in negotiations where the two clients will have a continuing relationship, such as the formation of a partnership or the writing of a long-term supply contract. Even where the parties are hostile to each other, such as in some divorce settlements, the cooperative approach between the lawyers can help to achieve, in so far as is possible, the objectives of both parties.

> Any method of negotiation may be fairly judged by three criteria: It should produce a wise agreement if agreement is possible. It should be efficient. And it should improve or at least not damage the relationship between the parties. (A wise agreement can be defined as one which meets the legitimate interest of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account.)[2]

2. Determining and dealing with underlying needs.

Each lawyer should endeavor to learn the motives of the other party to the transaction and those of the other lawyer. Motives are not always related to money. If it is possible to find some other way to vindicate a party's vengeful motive, the lawyer may be able to reach an agreement on a price lower than that originally demanded. For in stance, an apology may be very important to someone who feels that he was wronged--more important than money.

3. Good guys--bad guys.

The "good guys - bad guys" technique is where one person on the lawyer's team is the "good guy" who is reasonable and willing to go along with what the other side requests, and another person on the lawyer's team is the "bad guy" who refuses to accept the other side's request. In transactions where the parties are going to have a continuing relationship, the client usually will be the good guy and the lawyer will be the bad guy. In such negotiations, the lawyer may suggest a tough position and, if the other side gets upset about it, the client can say, "I'm sorry. I didn't mean to upset you. My lawyer got carried away. You are absolutely right, we shouldn't be insisting on so strong a position." Thus the goodwill between the parties is maintained and, to the extent that there is no objection to the position the lawyer has taken, the lawyer's tough position has been effective. If there is an objection, it is understood between the lawyer and her client that all of the blame goes on the lawyer's shoulders.

There are times in a negotiation with another lawyer when the client will be the bad guy. The lawyer may say, "Your proposal normally would be reasonable, but my client isn't a normal client. He is absolutely unreasonable and insists that this is what it will take to settle this case." In that example, where the client is the bad guy and the lawyer is the good guy, the lawyer can continue to have effective negotiations with the other lawyer. Such an approach may be useful where the client and the other party have had a relationship, the dissolution of which is the subject of the negotiations. It can also be used in negotiations for the settlement of tort claims where the parties have not had a prior relationship and do not anticipate a future relationship with each other. The client should not be the "bad guy" where the parties expect to have a continuing relationship.

4. Threats and promises.

It is important that a lawyer never make a threat or a promise that she cannot keep or does not intend to keep. The lawyer should not establish a reputation for threatening to sue and then not suing. A good policy is that a lawyer never threaten litigation unless authorized by the client to litigate and unless she has the intention to do so if the other side does not accede to the lawyer's demands. Otherwise the lawyer may get a reputation in the community as someone who makes a lot of empty threats and no one will take her threats seriously.

Similarly, a lawyer should not promise that the client will do something unless the lawyer is authorized by the client to make such a promise and believes that the client will keep it. Of course, there may be intervening circumstances which prevent a promise from being fulfilled. But, absent such unexpected obstacles, the lawyer should not make promises on behalf of the client which the client does not intend to keep. The lawyer should not make promises on behalf of herself which she does not intend to keep.

Closely related to threats and promises is leverage. Leverage is created when one party has something the other party wants or needs, or when one party can refrain from doing something that the other party wants done or not done. A lawyer may obtain concessions from the other lawyer because of leverage which her client has over the other client. It is unethical, however, to obtain such concessions because of leverage over the other lawyer.

5. Use of questions.

Questions can be very helpful in a negotiation. When someone says, "We must have $1,000,000," the lawyer should ask, "Why?" or "Why is it that you must have the money in thirty days? Please explain." It is helpful to get the other side to talk about the reasons behind their demands and their position. Questioning the reason for the demands of the other side can help to soften the rigidity of an expressed position and can give the lawyer asking the questions some basis for rejecting the demand or the offer. The lawyer should encourage the other person to talk without interrupting or immediately responding to what has been said. The information the lawyer receives in answer to her questions gives her something to discuss other than discussing the demand itself. With such information the lawyer can determine whether the demand or offer is well founded. It may be based on erroneous information or assumptions. The information the lawyer obtains may lead to a creative solution to the problem.

6. Use of silence.

Eye contact during the lawyer's negotiation is important. The lawyer should look the person straight in the eye. It is important to remember that there is nothing wrong with simply staring at a person after he has made a proposal until he comes up with something else. Most people cannot tolerate silence. If the lawyer just sits there looking at the negotiator on the other side, he may either change his own offer or demand, or give the lawyer some further information.

7. The hard bargainer.

How does the lawyer deal with someone who makes an offer and says, "Take it or leave it"? One way is to make a counter offer, nevertheless, and make the other lawyer specifically reject it, if he must.

8. Using non-verbal communication.

Non-verbal communication plays an important role in negotiations. The ability to control one's own non-verbal messages and to understand the non-verbal messages of others can be very useful in negotiations. This is discussed further under the heading Psychological Factors below.

9. How to make offers and demands.

Offers and demands should be clearly stated. A precise offer gives the other side something to deal with and respond to. In making an offer the lawyer should act as if that offer has been well considered--that you are not just plucking figures out of the air. It is very difficult to have successful negotiations if there is no way the other side can perceive the basis for the lawyer's offer or demand. The lawyer should have a reason for her offer and a reason for a change.

If the lawyer makes an offer and the other side gives her some reason for it being inadequate--for example that the product has recently received government approval-- the lawyer making the offer might then say, "I understand what you're saying, and based on the information you've just given me, we will raise our offer from $10,000 to $15,000." If later the other side, in asking for more money, again points out the government approval of the product, she can reply, "You have already made that point,and based on that we raised our offer from $10,000 to $15,000. Don't keep telling us about it. The government approval is worth an extra $5,000 to us and we have agreed to give it to you." Then the other side is forced to admit that they have no specific reason for asking for more.

Reactions to offers must be genuine or, at least, appear to be so. If an offer or demand is made which the lawyer feels is outrageous, the lawyer must respond immediately. If she waits five minutes, the lawyer might say, "That is not adequate," but she cannot say, "That is outrageous!" and be believed. If the lawyer is going to be outraged, she must be outraged immediately. If she reacts immediately, the lawyer has given some idea to the other side that they are pushing too hard. But if she waits, there is no spontaneity and they will believe that the lawyer simply wants them to think that the proposal is outrageous, but that she does not really think that it is. If, however, the lawyer is not outraged, she need not reply instantly to their proposal.

The timing of the lawyer's offer can be important. The lawyer may want to wait until she has done a lot of exploring and has received more information from the other side before she makes any offer at all. She does not have to start negotiating the substance of the agreement at the beginning of the negotiations. One of the first things she might be negotiating for is information. She may say, "We need more time to consider this. Let me have all of your proposals so we can consider them at the same time." In this way the lawyer receives more information, but she defers responding to it, often until a later date.

10. Patterns of offers.

If the other side makes an offer of $10,000, and their next offer is $15,000 and the next is $17,500, the lawyer might expect that somewhere between $18,000 and $19,000 is where they are prepared to go. Now, if the lawyer's assumption is correct, she has gleaned some useful information. However, patterns of offers can be used to intentionally mislead the other side. Perhaps the other side was willing to go to $25,000, but by moving up in this sort of patterned increment, they were intentionally giving a signal that they were prepared only to go to an amount between $18,000 and $19,000.

Because false patterns of demands and offers may be given, such patterns must be considered only in conjunction with other factors in the negotiation.

11. Dealing with emotions.

The lawyer must deal not only with his own emotions but with the other lawyer's emotions and with the emotions of the clients on both sides of the transaction. The lawyer should understand his emotional needs and reactions and try to control any undesirable aspects. If he is easily upset so that he cannot function effectively, someone else can manipulate him by acting in a manner that will upset him. Even if someone else is having a temper tantrum, the lawyer should remain calm.

There are some situations in which it is inappropriate to remain calm. If the client is excited about something, the client usually will feel more comfortable with the lawyer if the lawyer appears to share his emotions. If the client believes that his lawyer's apparent calm reflects indifference, the lawyer may lose rapport with his client.

12. Assumptions--right or wrong.

It is important to know the assumptions of both sides of the negotiation and to determine whether they share a common basis. Are they both assuming that there will be an agreement? If the assumptions of the other side are different from the lawyer's, she must decide whether it is desirable to call their attention to the differences. Usually it is desirable to do so, but at a minimum the lawyer should be aware of the differences in order to maximize her effectiveness as a negotiator.

13. Creative problem solving.

Creative problem solving can be useful when usual solutions will not work. For example, if a house painter owes a store $500 and has not paid it because he says he does not have the money, one side or the other might suggest that he paint the store in settlement of the claim. Both sides benefit from this settlement which would not have occurred if the parties limited their negotiations to the payment of money which the painter did not have. If the lawyers do some brainstorming they may come up with some very creative solutions. However, a lawyer should not suggest a solution without first obtaining his client's approval. Once the other side becomes enthusiastic about the suggestion it might be difficult to have them drop the proposal.

14. Dealing with the client.

The client often enters a negotiation with very high expectations. What the lawyer learns from the other side often renders some of those expectations unreasonable or unwarranted. If the client wants something from the negotiations that the lawyer can get without legal or ethical infraction, the lawyer should do her best to get what the client wants even though contrary to the lawyer's business judgment. In short, the lawyer's objective should be to implement the client's wishes. If the lawyer desires something that the client is not interested in, the lawyer should not give something away in order to get it for the client.

The lawyer should keep the client informed as to the progress of the negotiations including offers and positions taken by the other side and the reasons given therefor.

If the client is present at a negotiation session, the lawyer should be sure that he understands that the lawyer is the negotiator, and that the client should be a silent observer.

15. Packaging agreements.

It can often be useful in negotiating an agreement to group various elements together and bargain in packages. In doing so care must be taken not to inadvertently disclose the importance of certain provisions of the agreement.

16. Preparation of drafts of agreements and use of precedent.

When a negotiation involves the preparation of a document, the draftsman has many more opportunities to serve his client than the person who merely reviews and suggests changes in the draft. Therefore, in most instances, it is advantageous to be the draftsman.

By preparing the first draft the lawyer sets the format of the agreement and can use language favorable to his client on matters where specific language was not agreed upon, much of which will remain in the agreement. Precedent can be used in preparing the first draft of an agreement. Precedent can also be used in support of the lawyer's request to include language in the agreement being negotiated.

17. Mediation.

Mediation is a form of negotiation in which an impartial third party attempts to bring the positions of both parties together to assist them in reaching an agreement. It is to be distinguished from arbitration, where, as in litigation, the decisions on the matters not agreed upon by the parties themselves are made by a third party. Unlike arbitration, mediation involves, ultimately, an agreement by the parties through the efforts of an impartial third party.

Although mediation is often useful in the resolution of disputes, it is rarely necessary to resolve differences that occur in negotiating transactions where the parties will have a continuing relationship. If the parties are unable to negotiate directly with each other in the mere preparation of an agreement, the possibility that the parties will be able to work with each other thereafter is slim.

18. Negotiation with multiple parties.

In negotiations with multiple parties consideration should be given to separate agreements with each party. Where the negotiation involves the settlement of litigation, if one or more of the plaintiffs are reluctant to accept the amount offered by the defendant, they may be induced to settle, if the defendant offers an amount greater the sum of the separate offers, to be divided by the plaintiffs among themselves. Such offer should be made contingent upon all the plaintiffs agreeing to the settlement, thus giving to the plaintiffs desiring to settle the litigation an incentive to pressure the reluctant party to accept the settlement offer.

19. Preparing for alternatives to agreement.

By preparing to implement the alternatives to negotiation, such as preparing the necessary legal documents to institute a lawsuit and delivering a draft of such documents to the other lawyer, or, in a business transaction, beginning discussions with competitors of the other lawyer's client, pressure may be put upon the other side to accept the negotiator's proposal.

20. Other tactics.

There are a variety of other strategies and tactics used by negotiators. For example, there are lawyers who are personally offensive to the people with whom they are negotiating. They use their offensiveness as a tactic to get the other lawyer upset so that he is unable to act effectively. Such conduct is unprofessional, but one should be aware that there are lawyers who will intentionally try to get the other side off balance on a personal basis.

Another tactic that is sometimes used is to return to matters already agreed upon to try to change the agreement that was previously made. The person keeps coming back and asking for a little more. One way to deal with a lawyer who tends to keep coming back to previously settled issues is to have an understanding at the beginning of the negotiations that once an issue is resolved the lawyer will not re-open it. Such an understanding is not binding, of course, but it might discourage the other lawyer from reopening closed issues.

The tactic of re-opening settled issues loses its effectiveness if used frequently because the other side will be hesitant to agree about anything, reasoning that until all items have been resolved there is no real agreement. Rather than agree they will say to the lawyer, "Tell me everything you want. Write it all down and I will look at it. But, I will not react to any of these things until I see your entire package and know that you are not going to keep coming back to request more."

C. Memoranda of Understanding and Letters of Intent--When to Use Them and When Not To Use Them.

There are differences of opinion as to the desirability of memoranda of understanding and letters of intent. One of the problems with them is that they may constitute an agreement. If they are written so as to constitute an agreement, a problem may arise because the memo or letter lacks many of the details and refinements that one or both of the parties contemplated. To avoid such problem, if there must be a letter of intent, it should be made clear that the letter of intent is just an expression of desire on the part of the two parties, and that it is not binding. Similarly, memos of understanding can clearly state that they are just expressions of the current stage of the negotiations, and that the whole matter is still open for further discussion. Normally, if the lawyer plans to make many changes, she would not want a letter of intent or memo of understanding, because a written document, even if not binding, inhibits change. The exchange of a draft clearly indicated to be a tentative proposal, subject to further change, does not constitute a memo of understanding or a letter of intent.

IV. PSYCHOLOGICAL FACTORS

A. Effect of Racial, Ethnic, Gender and Age Differences and of Power and Status.

The effect on negotiations of racial, ethnic, gender and age differences can be substantial. The lawyer should consider the effect these factors might have on the negotiations and decide, in advance, how she is going to deal with them. If the person the lawyer is negotiating with is of a different race, ethnic background or sex, some ordinarily innocent comment might be taken very personally and result in strained relations between the negotiators. The telling of a racial or ethnic joke is often offensive not only to someone of the race or ethnic background in question but also to others.

The power and status of the lawyer involved in the negotiation as well as the power and status of their clients are factors to be considered in choosing negotiation strategies. The greater the power of one negotiator relative to the other, the more likely it is that the negotiator with power can dictate her terms and force the other to accept them. There are two possible reasons for not negotiating: because one is weak and cannot afford to, or because one is strong and does not need to.[3] However, a negotiator whose position is weak may convince another whose position is stronger that his offer is final. If the other negotiator prefers an agreement on the basis of this "final offer" rather than no agreement, she may accept the offer.

Perception plays a crucial role in negotiation. The opening offer and size of concessions serve as cues regarding the other party's alternatives and can help one to determine the bargaining strength of the other side. Disclosure of information may be interpreted as a concession and is therefore, likely to elicit reciprocal disclosure on the part of the other side. Thus, by disclosing information that reveals little of value, the negotiator may lead the other side to reciprocate the "concession" by revealing more valuable information. However, disclosure of too much information may be interpreted as a sign of weakness and cause the other side to "dig in" and adopt a tough strategy. An experienced negotiator can lead others to believe she has many attractive alternatives and conceal any pressures to reach agreement.

B. Non-Verbal Behavior.

Non-verbal communication (NVC) is a very important part of negotiation. The ability to interpret facial expressions,[4] gestures, posture and body movements[5] can assist the negotiator in determining the true responses of others in the negotiation session. The ability to use body language can allow the negotiator to appear to have the reactions desired and thus be more effective.

Confidence, self-control and nervousness and other messages may be conveyed through hand movements. Hands are the ultimate weapon in a negotiation, yet they are also the final peacemaker as the parties shake hands over an agreement. They can be used to emphasize or de-emphasize, to interrupt or to support, to reject or to accept.[6] Employing the hands while speaking and listening may help achieve a desired goal more easily.

It must be emphasized that no single gesture is reliable on its own. Posture and body position must also be considered with gestures and expressions.

The use of personal space is another aspect of NVC which allows the negotiator to control the negotiation and to effectively reach the other side. Those involved in the analysis of NVC agree that there are four areas of space surrounding and extending from an individual. These are the intimate, the personal, the social and the public distances.[7]

Seating dynamics should be considered with respect to the use of personal space.[8] Persons seated across from one another are in a competitive position whereas those seated next to each other are more likely to work cooperatively. Sitting at adjacent corners of a table will enhance conversation, whereas if another person is seated between two people who wish to converse, communication is difficult.[9] Therefore, seating arrangements may have an influence upon the negotiation itself.

There is a great deal of literature on the subject of non-verbal communication which cannot be summarized here.

A lawyer should be sensitive to the cues that he gets from other people, and also to the cues that he gives other people and be aware that some people, understanding these cues, give false cues in order to confuse those with whom they negotiate. The interpretation of NVC is not an exact science and therefore there are many exceptions to the interpretations indicated above.

C. Psychological Factors in Selecting Bargaining Strategy.

An understanding of the psychological factors in negotiation can assist the negotiator in determining which bargaining strategy to use. Various models of bargaining strategy have been proposed by psychologists, each of which is effective under certain conditions.[10]

The relative pressures to reach an agreement are a crucial factor in determining when a tough strategy can be used by the negotiator. One researcher has indicated that a soft strategy produces better results in both the high and low-pressure conditions. Once a breakdown in negotiation occurs, a softer approach leads to higher average settlement, speedier agreements, higher yielding rate by the opponent and a greater frequency of agreements.[11] Negotiators define bargaining as a give-and-take process and expect it to consist of a series of exchanges, not just one large concession.

A firm bargaining strategy may be very effective against a party who is under pressure to settle, but may not be as effective against a party who is not under such pressure. When a bargainer is under pressure to settle, he will tend to yield more. When he believes the other party is under pressure to settle, he will yield less. A negotiator with pressure to settle will make more concessions and will settle for less than the party without the pressure. When pressures to reach agreement are equal for both parties, the result is an increased rate of concession and correspondingly a decreased number of offers and counter offers before agreement is reached.

D. The Negotiator's Self Perception.

How a person evaluates and perceives himself is based on the total collection of attitudes, judgments and values which an individual holds with respect to his behavior, his ability and his worth as a person. A person who has recently had a successful negotiation experience is more resistant to persuasion even if the successful experience is not related to the issue on which persuasion is now being attempted.[12]

Thus a person with a good self-image, based upon prior success, is likely to be a successful negotiator. An understanding of what is motivating a lawyer can help make her a more effective negotiator.

V. ETHICAL CONSIDERATIONS

As a negotiator, a lawyer should seek a result advantageous to her client, while at the same time dealing fairly with others involved in the negotiation. While not addressing itself specifically to the negotiating lawyer, the institutionalized ethical limitations for lawyers are set forth in the American Bar Association's Model Code of Professional Responsibility (hereinafter cited as "Code").

Specifically, the Code prohibits the lawyer from engaging in any dishonesty, fraud, deceit or misrepresentation;[13] from circumventing one of the Code's Disciplinary Rules by sanctioning the unethical conduct of another,[14] and from allowing a client to perpetrate a fraud upon another person during the course of the representation.[15] Upon discovery of a fraud, the lawyer must request that her client rectify the fraud, and if the client is unable or unwilling to do so, the lawyer herself must reveal the fraud to the affected person, except when the information is privileged.[16]

A problem arises, however, when the client has requested the lawyer to retain a confidence, but failure to reveal the secret or confidence constitutes dishonesty or deceit as proscribed by the Disciplinary Rules.[17] In such a situation, the lawyer should explain to the client the need for disclosure and request permission to make the requisite disclosure. If the client refuses his permission, the lawyer's only alternative is to withdraw from further employment with the client. Withdrawal is mandatory when it is obvious to the lawyer that continued employment will result in violation of a Disciplinary Rule.[18] Furthermore, even if the confidence to be maintained would not result in the actual violation of another Disciplinary Rule, the Code allows withdrawal if the confidence is one that, in the judgment of the lawyer, should be revealed.[19]

The American Bar Association is presently considering adoption of a revised code of professional conduct. The Proposed Model Rules of Professional Conduct (hereinafter cited as "Rules") differ in substance, format and organization from the present Code. The proposed Rules would impose an affirmative duty on the lawyer to disclose facts in certain circumstances where "necessary to avoid assisting a criminal or fraudulent act by a client...."[20]

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances.

> Under generally accepted conventions in negotiation certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.[21]

In order to preserve the integrity of the attorney-client relationship, both the Code and the Rules prohibit a lawyer from communicating with the adverse party without the prior consent of that party's lawyer.[22] If the adverse party, on the other hand, is not represented by counsel, the Code merely prohibits the lawyer from advising that party in any way,[23] while the proposed Rules would require a lawyer to explain his role in the transaction to the unrepresented person.[24] The Code prohibits a lawyer from circumventing a Disciplinary Rule through the actions of another.[25] Thus the Disciplinary Rules are violated if, with the approval or consent of his lawyer, a client communicates directly with the other lawyer's client.

It is essential that the negotiating lawyer clearly understand the full extent of his authority. Should the lawyer purport to bind his client to something beyond the scope of his authority he is in danger of becoming personally liable for that act.[26]

Ethical problems may present themselves, however, if negotiation tactics are carried to an extreme. It is possible for the lawyer maintaining a hard bargaining position to negotiate his client out of a deal his client was eager to make, in which case the client may have a malpractice claim against his lawyer.

A lawyer may pride herself on her mastery of negotiation techniques, but she should never allow the use of such techniques to overshadow the interests of her client. A lawyer must always place her client's interests first. To the extent that such interests are furthered by negotiation tactics or strategies which are otherwise within the domain of ethical propriety, a lawyer is fulfilling her professional duty.

VI. RESEARCH NEEDS

Much research has been done as to the psychological factors in bargaining and negotiation.[27] However, less research has been done relating to the strategies and tactics used in legal negotiations and little research has been conducted as to the ethical factors in legal negotiations.[28]

Generally, the research pertaining to strategy and tactics has been based upon the negotiation of hypothetical problems by lawyers and upon responses to questionnaires concerning the perception that lawyers had of the negotiators.[29] Current research on ethical factors in legal negotiations is based upon responses to questionnaires sent to a limited group of lawyers.[30]

Because of the importance of negotiation in dispute resolution there is need for additional research into the effectiveness and ethical ramifications of various negotiation strategies and techniques. This author believes that, in addition to continuing research of the type heretofore conducted, comprehensive analysis of the negotiation of a wide range of real, rather than hypothetical, problems should be made. The negotiations should be video-taped. Separate analyses of the video tapes from a legal, speech communication and psychological perspective by trained professionals should then be used to evaluate the effectiveness of various strategies and techniques. In addition, the participants should be interviewed after each taping session to record their perceptions of their behavior and that of the others involved in the negotiation.

This method of research could only be conducted with the consent of the negotiating lawyers and their clients. The loss of confidentiality resulting from the taping of the negotiation would limit the research to those matters in which confidentiality is not needed or is needed only for the duration of the negotiations. Private conferences between each lawyer and his respective client in preparation for negotiations are an important element in the negotiation process and accordingly should be included in the study. Because the lawyer-client privilege would be lost by the presence of observers at such conferences, these conferences could only be video-taped in those matters where the participants are willing to forego such privilege.

One of the disadvantages of research based on actual negotiations is that each problem being negotiated is unique, thus it will be difficult to compare the results obtained by different negotiators or by the use of different strategies or techniques. Research based on the negotiation of hypothetical problems facilitates such comparison.

There is also need for research into complex negotiations involving several issues, several parties, teams of negotiators on each side, or any combination thereof. Because many negotiations are multi-issue, multi-party or involve teams of negotiators, the study of these kinds of negotiations could have widespread practical application and will present interesting challenges for researchers.

More can be achieved through negotiation if negotiators have guidance as to what is most effective and efficient. Research regarding legal negotiations should help to provide such guidance.

FOOTNOTES

* The author, Norbert S. Jacker, is a Professor at DePaul University College of Law. This paper is based upon and extracted from his book, Effective Negotiation Techniques for Lawyers, to be published in 1983 by National Institute for Trial Advocacy, St.Paul, Minnesota. The author wishes to thank Wanda Hofmann, Victoria Merlo, Lennine Occhino and Howard Wertz for their suggestions and assistance in the preparation of this paper.

1. See generally D. Binder & S. Price, Legal Interviewing and Counseling: A Client Centered Approach (1977).

2. R. Fisher & W. Ury, Getting To Yes 4 (1981).

3. C. Bell, Negotiating From Strength (1962).

4. G. Nierenberg & H. Calero, How to Read a Person Like a Book 18-25 (1971).

5. The field of Non-Verbal Communication was popularized by Julius Fast. See generally J. Fast, Body Language (1970). K. Cooper, Nonverbal Communication For Business Success (1970).

6. Cooper, supra note 5, at 85.

7. E. Hall, The Silent Language (1959).

8. Cooper, supra note 5, at 31-3.

9. Id.

10. See Hamner, Effects of Bargaining Strategy and Pressure to Reach Agreement in a Stalemated Negotiation, 30 J. Per. & Soc. Psych. 458 (1974), Osgood, Suggestions for Winning the Real War With Communism, 3 J. Conflict Resolution 295 (1959), S. Siegal & L. E. Fouraker, Bargaining and Group Decision Making (1960).

11. Hamner, supra note 10.

12. See generally D. Byrne, An Introduction to Personality 271 (1974), Gelfand, The Influence of Self Esteem on the Rate of Verbal Conditioning and Social Matching Behavior, 65 J. Abn. & Soc. Psych. 259-265 (1962).

13. American Bar Association Model Code of Professional Responsibility DR 1-102(A)(4) (1982).

14. *Id.* DR 1-102(A)(2).

15. *Id.* DR 7-102(B)(1).

16. *Id.*

17. *Id.* DR 1-102(A)(4).

18. *Id.* DR 2-110(B)(2).

19. *Id.* DR 2-110(C)(1)(e).

20. American Bar Association Proposed Model Rules of Professional Conduct Rule 4.1(b), (proposed Final Draft, as amended to May 23, 1983).

21. *Id.* Rule 4.1 Comment.

22. American Bar Association Model Code of Professional Responsibility DR 7-104(A)(1) (1982); American Bar Association Model Rules of Professional Conduct Rule 4.2 (proposed Final Draft, as amended to May 23, 1983).

23. American Bar Association Model Rules of Professional Conduct Rule 4.3 (proposed Final Draft, as amended to May 23, 1983).

24. *Id.*

25. American Bar Association Model Code of Professional Responsibility DR 1-102(A)(2) (1982).

26. *Lieberman v Employer's Ins. of Wausau*, 84 N.J. 325, 419 A.2d 417 (1980).

27. Hamner, *supra* note 10.

28. S. Pepe, *Interim Report and Preliminary Findings on Standards of Legal Negotiations* (Feb. 1983) (unpublished report for Feb. 1983 American Bar Association meeting).

29. G. Williams, *Legal Negotiation and Settlement* 137-139 (1983).

30. Pepe, *supra* note 28.

FROM THE COMMUNICATION PROFESSION: COMMUNICATION STRATEGIES AND RESEARCH NEEDS IN LEGAL NEGOTIATING AND BARGAINING

Sean Patrick O'Rourke
Janet Sparrow

Negotiation is the primary means of resolving legal disputes in the United States.[1] The disputes on "which these statistics are based nearly always involve parties represented by attorneys and are settled through negotiation between the attorneys on behalf of the actual disputants."[2] Statistics confirm what most practicing lawyers already know: when consideration is given to the time attorneys spend in negotiation, whether plea bargaining, claim settlements, collective bargaining and labor negotiation, or contract formation, one of the most important skills to a lawyer is his/-her ability as a negotiator. Despite the importance of negotiating skills, law schools are given "low marks for the contribution they make to negotiating . . . understanding the viewpoints of others to deal more effectively with them . . . and interviewing."[3]

Our goal in this paper, therefore, attempts to enlarge the foundation for an understanding of legal negotiating and bargaining with an emphasis on communication skills appropriate to the legal negotiation process. The paper is organized into four sections. First, an overview of literature on negotiation, as it applies to communication and to the legal negotiation process, is presented. Second, we examine a survey involving practicing attorneys and their perceptions of legal negotiation. Third, a consideration of communication skills used in negotiation is offered, paying particular attention to those skills appropriate to legal negotiation. Suggestions for future research needs in communication and legal negotiation and bargaining complete the paper.

REVIEW OF SELECTED LITERATURE

Even the most cursory review of the social science indices heightens one's awareness of the vast array of literature on the negotiation process. Research encompasses any number of topics ranging from conflict, conflict management and resolution to bargaining, mediation, and arbitration. Yet, in spite of the impressive numbers (Putnam and Jones in the most recent update on communication and bargaining reveal some 150 sources[4]), one quickly notes that communication skills and how to use these skills in negotiation have not served as a focus for research efforts. Literature for the most part tends to center on conflict and the process of negotiation *per se*. In this section of the paper we examine the major works in negotiation in order to provide a backdrop against which an individual may examine the communication strategies and skills we offer below. We direct our attention to two areas of negotiation literature: first, general literature in the social sciences, and second, literature in the legal field. Given the specific purpose of our presentation, i.e., to offer communication strategies in negotiating and bargaining, this particular section of the paper presents only a limited review of literature. The section of the paper that demonstrates specific communication skills necessary in legal negotiating incorporates a more indepth analysis of the literature available on communication strategies in the negotiation process.

As previously suggested, there is a substantial body of literature in the social sciences pertaining to negotiation and related topic areas. For the most part, negotiation literature can be categorized as: one, literature that focuses on general bargaining behavior and two, literature that deals with bargaining in specialized settings and professions.

By way of a general overview, and before we discuss the two bodies of negotiation literature, we note that Hawes and Smith, Johnson, and Putnam and Jones offer concise literature reviews on communication and negotiation.[5] Hawes and Smith investigate the role of communiation in conflict. Johnson focuses on conflict management, game theory, and communication, while Putnam and Jones classify, review, and critique the research literature on the role of communication in bargaining. These three articles provide the reader a broad overall perspective of conflict, communication and the role of communication in the negotiation process. In addition to the general information, the three works offer valuable sources for further investigation into negotiation and bargaining.

The first area of negotiation literature concerned with bargaining behavior often presents theoretical and descriptive studies. The development of processual models of negotiation and the use of game theory characterizes the research. Numerous processual models of negotiation are available to the researcher. These models "concentrate on the processes in which parties influence each other's expectations, assessments, and behavior during the search for an outcome, thereby affecting the outcome itself."[6] One example of a processual model of negotiation is the eight step developmental model of P.H. Gulliver. The eight steps: search for an arena, composition of agenda, establish limits to issues in dispute, narrow the differences, preliminaries to final bargaining, ritual affirmation and execution of the agreement, cause, according to Gulliver, "the negotiators to formulate and adjust their expectations and preferences and in turn may induce modification of demands and offers concerning the issues in dis- pute."[7] Other authors that suggest a variety of developmental models of negotiation include Osgood, Raiffa, and Bartos.[8]

These models are principally concerned with the exchange of information between the negotiating parties and their interpretation of the information received. A problem with these models is that while they factor in the social interaction of participants they rarely explain the "how to" or skills involved in the actual process of negotiation.

Game theory, "originally an economic model for explaining strategic behavior, assumes that players aim to maximize their wins and minimize their losses; hence participants are motivated to gain an advantage over other players."[9] For those interested in conflict resolution and negotiation game theory, the Prisoners' Dilemma, attributed to mathematician A.W. Tucker, is most often suggested. Incredibly, the Prisoners' Dilemma has accounted for more than 300 bargaining studies done in the last 10 years![10]

Any number of authors present various perspectives on game theory and offer paradigms of negotiation based on their findings. These authors include Shelling, Strauss, Swingle, and Pruitt.[11] While it is possible to argue that the paradigms developed from game theories incorporate interpersonal characteristics of bargaining, critics of game theory often claim,

> although we found some predictions were remarkably accurate, their practical value was relatively small: in order to rate these predictions, we had to have information one usually does not have, such as knowledge about every move the opponent is going to make ... to make such predictions possible, we must simplify the conception of the process ....[12]

In a more sardonic fashion, Raiffa writes:

> Game theorists . . . examine what ultrasmart, impeccably rational, superpeople should do in competitive, interactive situations. They are not interested in the way erring folks like you and me actually behave, but in how we should behave if we were smarter, thought harder, were more consistent, were all-knowing.[13]

Game theory, perhaps more useful in economic prediction than in the prediction of bargaining behavior is, nevertheless, often utilized as a framework for just such predictions. Like processual models, game theory serves a useful purpose but, in the final analysis, the theories do not give insight into the skills necessary for negotiation.

Negotiation literature that deals with bargaining in specialized settings is characterized by studies that attempt to determine variables important in the successful negotiation process. Some studies for example, attempt to discover the actual role of communication in the negotiation process. Smith suggests a confirmation of the hypothesis that "when moderate conflict is to be resolved by bargaining, "talking it out" is functional rather than dysfunctional."[14] Reiches and Harral discover "while verbal satisfaction of the settlement increases with time, individual satisfaction with the settlement becomes less related to the quality of the settlement."[15] Turnbull, Strickland, and Schriver demonstrate greatest agreement (highest joint outcomes) results in face-to-face negotiation versus audio/video and audio only, thus concluding negotiation outcome can be dependent on the particular communication mode being employed.[16] Other commonly explored variables include promises and threats, reciprocity, concessions and compromise, and power.[17] This list of scholars and variables is far from exhaustive. The examples are intended only as an indication of the research being conducted by social scientists interested in understanding and improving the negotiation process.

While there are vast amounts of literature in the social sciences, a paucity of research is being conducted specifically on the role of negotiation in the legal field or the communication strategies necessary when participating in legal negotiating. Rieke supports this notion when he writes: "While no formal communication based research has yet been done on various alternative ways to resolve disputes . . . legal writers have clearly invited it."[18] For the most part, the writing in the legal arena tends to view negotiation in terms of pedagogy. Many of the authors claim a need for offering courses on negotiation in the nation's law schools for, as Peck and Fletcher write, "recent empirical studies of law in operation have established the relative infrequency with which disputes are resolved by litigation or, to state the converse, the frequency with which the resolution of disputes is accomplished by negotiation."[19] Peck and Fletcher suggest not only the need for a course in negotiation, but offer as an example a class they taught at the University of Washington Law School. Peck and Fletcher, as well as Matthews and White, argue that classes in negotiation ought to be taught and offer available course materials and case models.

Having taught the class, the authors also enumerate their learnings about legal negotiation. Matthews posits four types of negotiating skills he perceives as important: "positive advance of position; onslaught on opponent's position; defensive protection of one's own position; and behavior, manner, and command of data."[20] White feels that classes expand awareness of negotiation as a process and the lawyer's role as a person manipulator. More importantly, though, classes teach an appreciation for the importance of emotional forces in the negotiation process.[21] Peck and Fletcher, in a final evaluation, argue meaningful generalizations can be made about the negotiation process, but do not choose to state them. None of the three authors, except perhaps Matthew, in any way suggest a clear stragegy of "how to's" of legal negotiation. Even Coleman, writing in 1980 and Ortwein in 1981, do not offer the student, teacher, or practicing attorney any advice on particular strategies, legal, communication, or otherwise, that would aid in actual legal negotiating.[22] Both authors, like those writing before them, reiterate the need for classes in negotiation and present a model from which to teach the class.

Two additional sources need to be mentioned. These are works by Gary Bellow and Bea Moulton, and Harry T. Edwards and James J. White.[23] These texts, intended to be used in law school courses devoted to the study of negotiation, attempt to make sense of the skills a lawyer uses in negotiation and bargaining. Both draw heavily from the extant social science literature on negotiation and related areas. The texts are a compendium of information and advice on the negotiation process, case models, techniques, skills and ethical concerns. While these treatises tell the prospective legal negotiator what s/he should attempt to achieve through negotiation, and in a general sense how to achieve it, they fall short of an indepth analysis of working communication skills. However, aside from these texts, the scholarly literature in legal negotiation attempts to provide guidance to professors as to how to teach classes in negotiation but offers little advice to individuals interested in discovering how to effectively negotiate in the legal setting.

THE SURVEY

A review of the literature on communication and negotiation suggests a number of variables scholars determine to be important in the negotiation process. These studies, while fundamental to our understanding of the negotiation process, provide little insight into specific communication skills used in legal negotiation. We attempted, therefore, to undertake a limited survey of practicing attorneys to determine what variables those individuals who participated in the legal negotiation process viewed as important. This survey was by no means intended to be indicative of the view of all attorneys. Rather, the survey only offered the opinions of those who responded to the questions and provided us with a preliminary corpus of information on which we could base our suggestions on communication skills important in legal negotiation.

The survey was mailed to 104 members of the graduating classes of 1975, 1977, and 1981 of the University of Oregon School of Law. This group was chosen because of the availability of names and addresses as well as our erroneous supposition that University of Oregon graduates would be more inclined to return a survey being conducted by University of Oregon researchers. Individuals were asked to complete a two-page questionnaire. The first page consisted of demographic information; type of practice, contexts, and approximate percentage of time spent in legal negotiation and questions of if, how, and when respondents thought they "learned" communication skills related to negotiation. The second page listed 19 variables gleaned from the review of literature on communication and negotiation. Respondents were asked to indicate, on a seven-point scale, their evaluation of the importance/unimportance of each variable. Of the 104 questionnaires mailed, 20 were returned completed, for an overall rate of response of approximately 20%. This rate of return, while admittedly less than optimal, nevertheless provided us with a foundation from which we could begin to offer suggestions regarding communication skills.

Attorneys who returned the questionnaire had an average of five years of lawyering experience and were for the most part self-employed or employed in law firms. These attorneys reported that approximately 60% of their practice involved negotiations, and the contexts in which they most often negotiated were claims settlement and contract formation, while some were involved in plea bargaining. The role they most often performed in the process was as counsel for the party in dispute, while in a few cases they acted as arbitrators.

Responses to if, how, and where they had acquired communication skills in negotiation were fairly consistent. Over half reported that neither their undergraduate education nor their law school training provided them with the skills necessary for successful negotiation. A few indicated undergraduate classes in speech, psychology, and writing seemed helpful. Responses to additional skills relating to negotiation the attorney's would like to acquire reflected two ideas. First, many believed negotiation skills could not be taught; active experience was necessary. This notion was reflected in the following response: "I am uncertain that negotiating skills can really be taught. I suspect that life experience is a more significant teacher than training can ever be." In a similar vein, another respondent observed: "Negotiation skills are perhaps best learned by experience. It's unfortunate clients are the victims of this educational process."

The second type of answer to the question of additional skills attorneys would like to acquire was the general response "whatever works." One attorney disclosed that "I'd like to learn more effective techniques of negotiating; various approaches and how these approaches work." This was typical of the general response to the question. Another often expressed desire was to "learn how to effectively analyze opponents' goals, needs, and desires; and to 'read' the opponents' reactions including the more subtle messages." In what seemed to be one of the most revealing responses to the question, one attorney wrote that she would like to learn "some method for dealing with an adversary negotiator who combines the following three qualities in equal parts: stupid, stubborn, and arrogant." This desire for a method to deal with such individuals is probably more pervasive than our survey indicated![24]

The second part of the questionnaire required the attorneys to rank each of nineteen communication variables on a seven-point scale; one being unimportant, seven being most important. The nineteen variables and the attorneys' ranking of each can be found in Table 1. The following section of the paper dealing with communication skills and research needs focuses on the individual variables.

We do not, of course, claim the results of this survey to be representative of the view of all attorneys. The results do offer, however, a unique insight into the negotiation process; a glimpse by those attorneys who are actual participants in negotiating proceedings. We agree with the respondents who pointed out the value of "experience" in learning negotiation strategy, and with Putnam and Jones when they write:

> Some practitioners question the significance of studying communication and bargaining. They contend that the real settlements are made during informal gatherings, not at the bargaining table. No doubt, some long-term labor-management powers rely on interaction in 'smoke-filled back-rooms' and on historical precedent to reach settlements. But communication aids in the formation of bargaining relationships and in the nature of outcomes for less formal and less established bargaining settings. The resolution of this issue is not as important as the realization that both formal and informal bargaining are characterized by the strategic use of information in persuasive messages.[25]

We believe, as do Putnam and Jones, that the mastery of communication skills is not only possible but desirable to further ensure a successful negotiation experience. For, like any skilled artisan, the negotiator can be most effective only when equipped with the requisite tools of the trade. In the following section we offer a compendium of communication tools which we believe constitutes essential equipment of the effective legal negotiator.

COMMUNICATION STRATEGIES

Nonverbal Cues

Perhaps the most startling revelation of the survey concerns the lack of importance attached to the ability to interpret nonverbal cues. Of the nineteen variables surveyed, the ability to interpret nonverbal cues was ranked seventeenth.[26] The relative unimportance attached to the nonverbal variable is significant in light of the vast amount of research that has been conducted in the area.[27] The attorneys seem to have underestimated that which researchers find to be immensely important. We begin our discussion of communication strategies in legal negotiation, therefore, with some suggestions pertaining to nonverbal behavior.

Initially, attorneys need to be aware of how they and other negotiators use and perceive social and personal space. A full-blown treatment of this area of study, known as proxemics, is available elsewhere. Our discussion touches on only those findings we perceive to be most obviously applicable to the legal negotiator: choosing the negotiation arena, using appropriate conversational distance, and recognizing the significance of seating arrangements.

The negotiator's threshold consideration, the choice of an arena, is far more important than many negotiators believe.[28] The choice of arena necessarily concerns consideration of issues of human territoriality, or the geographical areas (rooms, houses, offices, etc.) to which people assume some sort of "rights." Filley describes three contexts of territoriality he believes should be considered by the negotiator: group, individual, and personal.[29]

Both groups and individuals tend to establish territorial boundaries and corresponding territorial behaviors.[30] Effective negotiators must be cognizant of both the boundaries and the behaviors that occur when boundaries are crossed. For example, people tend to feel more secure and more in control on their own territory and less so on others'. Filley writes, "When Party A is invited into Party B's office to discuss a problem, A is less secure than B, and A's problem-solving capabilities may be diminished as a result of anxiety."[31] Filley suggests the use of neutral territory to facilitate problem-solving. Of course, this suggestion is premised on the assumption that the parties involved in a legal dispute are equally desirous of a negotiated settlement. If this is not the case, strategies may be varied accordingly. Given this premise of territoriality, though, one can quickly grasp the significance not only of the difference between one negotiator's office and the other's, or a negotiator's office and a neutral space, but also of the difference between one's office and the firm's library or one's desk and the office easy-chairs. Whatever the situation, human behavior resulting from concepts of group or individual territoriality should always be considered when selecting a negotiation arena.

Awareness of personal space is also equally important to the effective negotiator, for conversational distance is dictated by the interrelationship of personal space , "type of encounter, the relationship of the communicating persons, their personalities, and many other factors."[32] Hall identifies four personal territories which tend to form "bubbles" of personal space around individuals: intimate, casual-personal, social-consultative, and public.[33] Of special interest to legal negotiators are the range of each bubble of personal space, what constitute violations and invasions of that space, and what changes in proximity tend to signify.

Hall claims that the intimate distance begins at the person and extends out approximately eighteen inches; casual-personal space ranges from eighteen inches to about four feet from the person; social-consultative space from four to twelve feet; and public distance from twelve feet to the limits of sight and sound. Intimate space is reserved for lovemaking, comforting, and protecting; entry into this zone for any other purpose, such as medical care, is done only within strictly prescribed rules of behavior. The casual-personal zone is the distance within which interaction with close friends is comfortably conducted. The third zone, the social-consultative, encompasses two different types of interaction. At the closer end of this zone, most impersonal business (e.g., people working together) is conducted; at the further end most formal interactions occur. Finally, the public zone represents distances in which interaction is uncomfortable.

Yet, what significance do these zones have for the legal negotiator? We see two general functions. First, legal negotiators may be able to use an understanding of personal space to gauge the other party's perceptions of the interaction. In separate studies, Sommer and Russo catalogued people's reactions to territorial invasions and described a whole vocabulary of reaction.[34] People tend to label space invasions as either 'positive' (liking, love, relief) or 'negative' (dislike, embarassment, stress, anxiety)" and react accordingly.[35] If a positive invasion takes place, people tend to reciprocate the behavior.[36] If a negative invasion occurs, people tend to take measures to compensate. Compensation behaviors include looking away, turning or leaning away, hostile glances, blocking with hands or arms, rubbing one's neck (and, in so doing, pointing the elbows directly at the intruder), and so on. Hence, a legal negotiator should be able to read the other party's perception of the interaction by 1) the initial distance at which s/he interacts; and 2) the manner in which s/he reacts to space invasion. Such perceptions of the other party's attitude constitute a valuable data base on which the negotiator can rely for decisions concerning demands, offers, counteroffers, and concessions.

The second function of a working knowledge of personal space has to do with the negotiator's goals. That is, if for some reason the negotiator desires to make the other party uncomfortable, anxious, or stressful, s/he may manipulate the personal space so as to be too distant or too close for comfortable interaction. Correspondingly, if the negotiator desires to make the other party comfortable, s/he may adjust the personal space so as to put the other party at ease.

The appropriate use of conversational distance, then, is quite important to the legal negotiator, as is the knowledge of group and individual territory when choosing the negotiation arena. A third communication tool, the recognition of the significance of seating arrangements, is related to the others and is equally important to the effective legal negotiator.

Knapp indicates that "summaries of the findings about seating behavior and spatial positioning can be listed under the categories of leadership, dominance, task, sex and acquaintance, motivation, and introversion-extroversion."[37] Due to the nature of the research and its questionable applicability to legal negotiation, the categories of sex and acquaintance and introversion-extroversion are not considered here.

Strodtbeck and Hook found that people seated at the ends of a rectangular table are more often perceived to be leaders than those seated at other positions, especially if they are perceived to be from a high economic class.[38] Knapp reports that those positions tend to attract task-oriented leaders, those with dominant personalities who are frequent talkers.[39] An obvious application of the legal negotiator is that s/he can use this data to analyze other parties to the negotiation and to create a perception of leadership/dominance in him/herself.

Sommers and Cook conducted experiments that determined seating behavior as related to different task situations.[40] The studies utilized round tables with six chairs and rectangular tables with six chairs, two on each side and one at each end. The research indicates that, where the task is simply to converse, people prefer corner or short opposite seating at rectangular tables and side-by-side seating at round tables (see Table 2). Where the task is cooperation, people tend to prefer side-by-side seating at either type of table. When people co-act (i.e., work on different projects at the same table), they attempt to balance a desire for the greatest amount of distance and the least amount of accidental eye contact. When two people compete, they tend to sit directly across from one another.

The usefulness of this information to the legal negotiator is immeasurable. S/he can determine how opposing parties view the task at hand. S/he can attempt to alter the shape and character of the negotiations by changing seats. Perhaps most importantly, the legal negotiator can use this data to pre-arrange the negotiation arena in an attempt to maximize the effects of seating arrangements on the task at hand. For example, in an effort to decrease competitiveness and increase cooperation, an attorney could arrange the seating so as to necessitate side-by-side or corner seating and avoid opposite seating.

Leadership, dominance, and task are not the only factors that affect seating arrangement. Motivation also plays a key role. Cook found that increased motivation is directly correlative to an increased desire to sit closer or to have more eye contact. When the motivation is affiliative, the choice is to sit closer; when the motivation is competitive, the choice is to increase eye contact.[41] Of course, the implications are clear: the negotiator can use this data to read not only the level of motivation in the other party, but the type or direction of the motivation as well. Equipped with this knowledge, then, the negotiator can better judge when to acquiesce, demand, or cooperate.

As is readily apparent, the different dimensions of seating behavior, as well as the choice of arena and the appropriate conversational distance, figure heavily in any negotiation situation. Yet, the study of proxemics is not the only applicable part of nonverbal communication. In the following section we offer data, skills, and strategies concerning the variables of deception and bluffing.

Deception and Bluffing

Certainly the most fascinating result of the survey concerns the related variables of deception and bluffing. Overall, the ability to deceive ranked dead last in importance, and the ability to bluff ranked but one notch higher. Perhaps even more significant, the ability to deceive was rated least important on every survey, and the ability to bluff was judged unimportant only slightly less uniformly. Quite amazingly, however, the ability to *perceive* deception and the ability to *perceive* a bluff were seen as considerably more important: they ranked eleventh and twelfth, respectively. Our guess is that this result reflects an ethical concern as to purposeful deception on the one hand, and an open-eyed perception of the realities of legal negotiation on the other. Indeed, the two sides of deception and bluffing, the ethical and the real, are described with such poignancy elsewhere that we can do no better than refer to those scholars. As to ethics, Edwards and White write:

> On the one hand, a lawyer must represent his client "with zeal" in an effort to secure what his client wants and what the law will give him . . . . On the other hand, this representation must be within the bounds of the law . . . . The dilemma is . . . posed in negotiation situations for the lawyer who knows that to be a successful negotiator he must sometimes "puff" but never "lie" . . . .[42]

As to realities, Putnam and Jones note:

> Since negotiation is an exchange process whereby parties attempt to discover each other's final or last offer . . . some deception is built into the very model of interpersonal trades.[43]

Given these two horns of the deception dilemma, we see our goal to be one of illuminating the effects of deceptive communication and of providing attorneys with insights as to the beheaviors exhibited by deceptive communicators. We do not perceive the teaching of deceptive negotiation to be within our mandate.

Initially, Turner, Edgley, and Olmstead discovered that nearly three-fourths of the statements people make in conversation are deceptive.[44] Furthermore, the authors argue that deceptive communications are necessary, even mandatory elements of discourse, for they function as controls on information. Deceptive communications, the authors feel, enable a conversant to avoid embarrassment, disruption, and conflict. Knapp and Comadena further document the pervasiveness of deceptive discourse, while Camden, Motley, and Wilson isolate motivational factors behind conversational lies.[45]

A considerable amount of research indicates that, in fact, honesty may not always be the best policy. Monteverde, Paschke, and Tedeschi found that, as a general rule, honesty in negotiations is a good policy.[46] If a negotiator is honest and compliant to another party's threats, s/he tends to convert the threatener into a cooperative partner. If the negotiator is honest and defiant to the threats, s/he deters the threatener from sending threats.[47] These findings notwithstanding, Monteverde, et al., found that "deceit also can serve the interests of the simulated target when he intend[s] to defy the threatener behaviorally."[48] In such instances, the deceitful/defiant negotiator inhibits the other party from sending threats and even opens the threatener to exploitive strategies. Hence, deception serves the negotiator well. The only instance in which deceit hurts a negotiator is when s/he indicates that s/he will defy the threatener's demands, then fails to do so. This policy only encourages further threats and exploitation.[49]

Chertkoff, et al., found that honesty or dishonesty in the other party affects a negotiator's own honesty or dishonesty in a one-on-one situation but not in a situation in which the negotiator bargains simultaneously with one honest and one dishonest person.[50] That is, in one-on-one situations, negotiators tend to imitate the honesty or dishonesty of the other party. In simultaneous one-on-two situations, negotiators tend to behave consistently towards both honest and dishonest parties. Finally, negotiators are just as likely to reach a final agreement with a dishonest person as with an honest person in one-on-one situations but prefer to make agreements with honest people when bargaining with two others simultaneously.

What does all this mean to the legal negotiator? First, in many situations, the strategy of deception not only fails to generate negative consequences, but also is quite effective. Second, given the risk/benefit imbalance, coupled with the pervasiveness of conversational deception, one can only conclude that many negotiators employ the strategy of deception. Consequently, the ability to perceive deception and bluffing would appear to be an important skill for legal negotiators to acquire.

How, then, does one perceive deception? What are its characteristics? Knapp, Hart, and Dennis predict that "deceivers will exhibit significantly more uncertainty, vagueness, nervousness, reticence, dependence, and unpleasantness than nondeceivers."[51] They also argue that deceivers use fewer words, fewer different words, fewer past-tense verbs, more "allness" terms (all, none, etc.), more other references (they, them, etc.), fewer group references, and fewer self references.[52] Numerous studies indicate that deceivers speak for shorter periods of time[52] and at a higher pitch[53] than nondeceivers. Additionally, deceivers tend to be characterized by longer pauses between question and response than do nondeceivers.[54] Finally, deceivers tend to increase self and object manipulations with the hands.[55] The literature on eye behavior, as Knapp and Comadena note, is characterized by inconsistent results.[56]

The attorney can, of course, use this information in his/her attempts to perceive deception. Two caveats, however, are warranted. First, Ekman and Friesen note that accuracy of perception is increased significantly if the observer has seen the deceiver in previous encounters.[57] Ostensibly, the earlier encouters provide a basis of comparison between the subject as honest and the subject as dishonest. Second, while much of the research indicates differences in certain variables between honest and dishonest subjects, the amount of difference may vary widely from case to case, circumstance to circumstance.

As a consequence of these limitations, the legal negotiator may want to depend on other, more tangible communication skills. In the following section we discuss one of these skills, listening.

Listening

Attorneys responding to the survey perceptibly ranked the ability to listen as an extremely important variable, second only to honesty. These attorneys are aware that "listening carefully to words uttered by the opposer, his phrasing, his choice of expression, his mannerisms, his tone of voice, all give clues to the needs behind the statements he makes."[58] The ability to listen involves more than just hearing the words of another individual, listening is the reception and interpretation of those words.

Most of an individual's communication time is spent listening.[59] This is particularly true in the negotiation process. Because individuals have been listening all their lives, they assume they are good listeners. The truth is, most of us are not good listeners and need to work on the communication skills necessary to become more proficient.

Why don't we listen? Adler and Rodman suggest four reasons: preoccupation, rapid thought, faulty assumptions, and the fact that talking has more apparent advantages, as possible explanations.[60] Preoccupation is intuitive; sometimes we are wrapped up in concerns that are more important to us than the messages others are sending. Daydreaming is also a form of preoccupation; "although we are capable of understanding speech rates up to 300 words per minute, the average person speaks between 100-140 words per minute, thus we have a lot of span time" to let our minds wander when others are speaking.[61] When this takes place, we usually think about personal interests, plan our responses to the other person's message, or interpret the speaker with what we believe are more important thoughts, our own.

Faulty assumptions occur because we believe, incorrectly, that "we have heard it all before" when in fact the information could be new or different. Or how many times do we dismiss a speaker because of personal bias? This, too, is a common barrier to good listening. Status and stereotyping are examples of preconceived attitudes which affect our ability to listen critically to another person.[62]

In many cases we seem to have more to gain by talking than by listening.[63] Talking gives us a chance to control others' thoughts and actions. Talking allows our ideas and opinions to be heard, to gain the respect of others, to offer advice and to release tension. However, listening is reciprocal, if we listen to others, they will listen to us.[64] These are only a few of the many barriers that preclude effective listening. Other factors often mentioned are faulty hearing, noise, information overload, and, most importantly, the fact that we aren't trained to listen well.

What are the implications for legal negotiators? A negotiator ought to be aware of some of the techniques of effective listening. Nierenberg claims that listening is as much a persuasive technique as speaking.[65] Negotiators can indeed use active listening to their advantage. For example, negotiators need to be ready to listen, mentally and physically. All attention ought to be directed towards the other party, all miscellaneous thoughts need to stop. The shift from the speaker to the listener always needs to be complete. It takes considerable concentration to listen actively. Recall the earlier statement that "listening involves more than just words," i.e., clues as to what intent is really behind the spoken words can be gleaned through active listening. Negotiators can better "read" the other person, in particular subtle messages and nonverbal cues, by listening intently.

A negotiator needs to withhold evaluation of the other persons' messages until the actual content and intent has been mastered. If there are words or issues that raise "red flags" or trip an emotional response, One ought to be aware of the reaction, but not tune out or turn off the other person. Suspend premature judgments, based on status and stereotype, so as to listen for information. Negotiators should not attempt to categorize another person. Individuals are not always as they appear. It is possible for a negotiator to fail in a bargaining attempt solely because s/he underestimates another person's capabilities, based on a capricious judgment about that individual. We tend not to listen as carefully to those individuals we judge as "not too bright." That decision can be a costly one.

While much of this seems quite fundamental (and it is), the fact remains, most of us do not listen well. We only need to take note of the number of times we ask others to repeat what they have just said to realize the little attention we often give other while they are talking. Better listening can be achieved through a recognition of the facts that: 1) we are not good listeners, 2) a knowledge of arriers to effective listening is essential; and, 3) understanding procedures for improving the skill are equally important. It takes resolute effort to improve the ability to listen, but the pay-offs can make it a worthwhile effort.

Questions and Answers

In order to be a proficient negotiator, one must be able to ask questions that generate the kinds of replies desired and to give answers that provide appropriate information. The works of Nierenberg and Washburne are excellent resources on questioning and answering, respectively.[66]

Nierenberg approaches the art of questioning from two different perspectives. First, he notes that questions may be studied by a three-step process: what questions to ask, how to phrase them, and when to ask them. Under "what," Nierenberg notes that questions should be phrased so as not to offend; they are meant as tools for understanding and data collecting, not as disciplinary measures. For example, in a contract formation negotiation, when one party seems to be quibbling over the terms of an express condition to performance, the other party may ask, "Do you want the condition clause or don't you?" The question is meant to discipline the other party for quibbling. According to Nierenberg's scheme, a more effective method would be to ask, "Do you have any problem with the condition clause, and, if so, can I help with it?"

Under the "how" rubric, Nierenberg advises that one should not put a person on the spot and should lay a foundation of why the question is being asked. Both of these procedures tend to help eliminate anxiety. Also, one should attempt to ask questions in a manner that makes answering easiest.

Finally, Nierenberg notes two tactics a negotiator can use to improve the timing of questions. The negotiator should always attempt to incorporate any interruptions into the next question, thereby overcoming the disturbance and gaining control of the negotiation. Also, a negotiator should try to incorporate the last statement made by the opposing party into the next question. By so doing, continuity is preserved, and the other party gets the feeling that his/her answers are meaningful.

Nierenberg's second perspective concerns the functions of questions. He lists five: 1) to cause attention; 2) to get information; 3) to give information; 4) to initiate thinking; and 5) to bring to conclusion.[67] The threshold consideration, of course, is to isolate the function or functions intended by a series of questions. The questions then can be designed accordingly.

Questions designed to cause attention are the ritualistic "Howe are you?" and "Wonderful day, eh?" These questions are wonderful openers because they cause little anxiety and tend to put the other party at ease. Questions designed to get information are usually prefaced with words such as who, what, when, where, etc. These questions do cause anxiety when asked unaccompanied by a reason for wanting the information. Questions asked to give information, by definition, are rhetorical in nature. For instance, the question "Has your client spent any time out of jail?" is designed not to get information, but to give it. The questions may, of course, cause anxiety when asked in anger or seriousness, but may also be humorous if asked appropriately. Questions asked to initiate thought are generally open-ended questions which allow the answerer to run on at some length. These questions are typically characterized by openings such as, "What do you think about...?" Finally, questions designed to bring the negotiation to a conclusion tend to have an air of finality about them, such as "So then, which one will it be?" or "Isn't this the best option?"

The legal negotiator, then, should consider the function of his/her questions and phrase them accordingly. Yet, what of the person on the other end of the questions? What can s/he do in response? Washburne claims two primary determinations are crucial. First, the negotiator must determine what meaning the question has for the questioner. Quite often, the questioner's purpose may be merely to cause attention with a pleasantry rather than to probe the weakest part of an opponent's case. As Washburne writes,

> "What did you do last night?" is not an attempt to find out about the crime you committed then. The answer can very well be a statement about the delightful supper which preceded the act.[68]

The appropriate answer, then, is, within reasonable bounds, the least incriminating one. Chances are that it is all the questioner wanted.

Washburne's second consideration is related to the first. That is, limit the question to certain restricted meanings and don't neurotically lead a vague question to the right target. Any area the answerer attempts to defend is most likely to draw more questions. Hence, by determining the intent of the question and limiting the answer to that intent, the question may prove harmless.

If the question is not harmless, three options are open to the answerer: 1) not answering at all; 2) managing the question; and 3) managing the questioner. The first option, not answering at all, involves preoccupying one's self with other matters or creating a slight distraction, either verbally or nonverbally. Washburne believes that, in such situations, the question will die for lack of response and the questioner will proceed to another, less dangerous question.

Barring that, the negotiator can attempt to manage the question. Five possible methods of managing the question are available. One can *misunderstand* the question. That is, if asked about the exculpatory clause, discuss the time of performance clause. Chances are the questioner will politely listen, believing you will eventually discuss the exculpatory clause. Amazingly enough, Washburne's research indicates that rarely is the question repeated.[69] If this fails, one can *limit* the question to answer only that which s/he wants to answer. Similarly, one can address the *more fundamental question*. That is, when asked "Did your party breach the contract?" one can respond, "The more fundamental question is, 'what constitutes a breach?'" This allows the negotiator to steer the question to his/her argument; that is, while a breach may have occurred, it was not a material breach. Finally, one can use the approach Washburne calls, *Is this really a question*? Using this method, the negotiator actually destroys the question. For example, in a plea bargaining situation, the district attorney may ask a suspect "Are you going to name your accomplice?" The suspect's counsel can respond by noting, "That's not even the question. The question is, how much is that information worth?"

Washburne's third option for the answerer is to manipulate the questioner. Essentially, this involves answering the question with another question. As the questioner tends to control the focus of the negotiation, this tactic allows the former target to assume command of the process. This strategy should be used with great care, as it tends to put the other party on the defensive and creates tension.

Quite apparently, the art of question and answer is far more complex than it at first appears. Although much of that art may appear to be intuitive, we believe even the best intuition appreciates guidance. Hopefully, the above framework will provide the legal negotiator with that guidance.

Nonverbal cues, ability to perceive deception, listening, and questioning and answering, then, are communication skills a legal negotiator can use to improve his/her negotiating success. Yet, many more communication variables are part of the negotiation process. We know something about all of them, but little about most. In the following section, we discuss some additional communication skills and research needs associated with those variables.

RESEARCH NEEDS

Through our survey we attempted to ascertain practicing attorneys' perceptions of the relative importance/unimportance of nineteen communication variables related to the process of negotiation. Yet, we have only discussed communication skills related to eight of them. What, then, are the other thirteen? Essentially the problem is two-fold. Some of the variables are not, by their very nature, variables to which actual, pragmatic communication skills can be attached. Others, while conducive to a skills oriented discussion, either lack the requisite research for such a discussion, or, while backed with adequate research, have yet to be examined within the negotiation context. First, we offer a discussion of these communication variables that have been researched, but not within the negotiation paradigm.

Attorneys who responded to our survey ranked persuasion as the third most important variable in the negotiation process. That persuasion is important is commonsensical. However, particular skills of persuasion applicable to the negotiation process are not. There is an abundance of literature on theories of persuasion.[70] Topics include those concerned with attitudes and attitude change, coercion, self-persuasion, group persuasion, credibility and a plethora of variables that may or may not influence persuasion. Most likely, many of the theories being researched in persuasion are applicable to the negotiation process. For example, many of the psychological/cognitive theories of persuasion on attitudes, values, and beliefs may be particularly helpful to a negotiator. However, our purpose is to indicate those skills a negotiator can employ that are persuasive in legal negotiations. Unfortunately, there is little literature in interpersonal persuasion that can provide us with this type of information. Therefore, our most obvious research need is for studies that attempt to determine the effectiveness of the various persuasive tactics in the negotiation setting.

Three other variables conducive to a skills orientation approach are keeping the negotiation focused, being perceived as sensitive, and the incorporation of evidence in the negotiation process. These three variables are not often discussed in negotiation literature and are, therefore, more difficult to address.

Keeping the negotiation focused is, of course, an essential part of the process. How one accomplishes that task is a skill that probably comes with experience and concentrated effort. Nierenberg suggests the modified use of questions to give the negotiation process direction.[71] For example, when one person goes off on a tangent, a negotiator can incorporate into the individual's last statement a question that can lead the thinking back to the focal point of the process. This is not an easy task, but with practice and effort it can be accomplished. We are not able to suggest, however, a specific skill required in this process.

What enables an individual negotiator to be perceived as sensitive is elusive at best. The obvious answer is the negotiator needs to be aware at all times of the other person or persons involved. Hart and Burke suggest that rhetorically sensitive individuals accept role-taking as a part of the human condition, avoid stylized verbal behavior, and always undergo the strain of adaptation.[72] That is to say, a sensitive negotiator is aware of the necessity to understand the complexity of individuals and to tolerate diversity. Different negotiations require the negotiator to take on different roles; people, issues, and settings are unique and require different perspectives. Regularity does not necessarily have to guide behavior. Because situations change, the negotiator must be willing to undergo all the strain that occurs with adapting to the various differences. Sensitivity takes an accute awareness of oneself and others and a willingness to do what is necessary to achieve that goal.

The use of evidence, in a general sense, is taught in law school. The communication field offers suggestions as to how an individual uses evidence in academic debate and public speaking, yet these situations are hardly analogous to the legal negotiation situation. Given this lack of specific research, experience and legal classes are the best teachers in this instance.

Six remaining variables were ranked by the attorneys. These variables are the ability to: be perceived as honest, generate alternative solutions, state one's position, be perceived as cooperative, offer compromise, recognize final offer, and be perceived as adamant. It is difficult to attach specific communication skills to these variables. We offer only a cursory analysis of each.

Little can be said about honesty. Attorneys ranked "being perceived as honest" as the most important variable in negotiation, and while common sense and ethics support this notion, the negotiation literature suggests occasions when deception is an integral part of the negotiation process. This is an individual decision. However, it would seem that the only way to be perceived as honest is to be honest.

The ability to generate alternative solutions, state one's position, recognize a final offer, and be perceived as adament are skills that develop through experience in the actual negotiation process. Recognition of the final offer and presentation of an illusion of strength come with practice. Generating alternative solutions requires an analysis of issues while negotiations are in progress, based also on research prior to the actual event. In all cases, there is no research specific to legal negotiating from which we can offer strategies to help in these particular areas.

Unlike the previously mentioned variables, there is a corpus of literature available on cooperation and compromise.[73] This leterature offers suggestions regarding what cooperation is and when to make compromises and concessions. For example, a party who begins by being very cooperative but decreases in cooperation over sessions may possibly be viewed as more cooperative than one that is only cooperative in the latter half of the negotiating session.[74] In general, cooperation begets cooperation, and the converse is also true. It appears likely also, that a negotiator who makes positive concessions is more likely to elicit cooperation from the other than one who makes either negative concessions or no concessions at all.[75] The above information is useful to the legal negotiator. However, the negotiator does not need specific communication skills to be cooperative or to make concessions. Rather, the negotiator needs to have an understanding of cooperation and compromise in the negotiation setting.

Little attention has been given to communication strategies that are applicable for the legal negotiator. While one can argue that available knowledge can be extrapolated to the legal arena, one cannot be sure that given the singularity of legal negotiations as compared to, for example, negotiations with terrorists or perhaps even more poignantly the seemingly impossible task of negotiating the Mid-East crisis, that variables applicable in one situation are applicable in another. We offer, therefore, the following general research needs:

1. Research conducted in actual legal negotiation settings as opposed to classroom simulations or non-legal settings;
2. Context specific research concerning communication skills related to persuasion, compromise, cooperation, and evidence incorporation;
3. Studies designed to illuminate the nonverbal behaviors of legal negotiators, specifically focusing on how those behaviors differ (if they do) from those of the general public in a variety of settings;
4. Research to determine more conclusively the behaviors of deceptive communicators, especially in the legal negotiation setting;
5. Inquiry into other communication variables, not mentioned in this paper, that are essential parts of the communication process in legal negotiation.

CONCLUSION

In this paper we have synthesized some of the available literature concerning communication variables at work in the negotiation process. We have attempted to integrate attorneys' perceptions of the relative importance/unimportance of these variables into our analysis. Finally, we have offered the legal negotiator a kit of communication skills s/he can carry into future negotiation sessions. We hope this offering achieves two goals: first, that the proffered skills will ensure more efficient, effective, and successful legal negotiations; and second, that this work will provide a minor stepping stone for those communication researchers traversing what has become, for us, a fascinating area of study: legal negotiation.

TABLE ONE

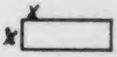
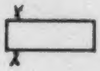
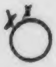
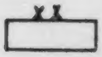
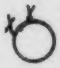
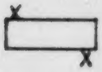
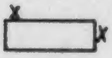
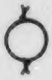
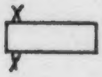
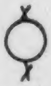
ATTORNEY RANKINGS OF COMMUNICATION VARIABLES

Attorneys rated the communication variables listed below on a point scale; one being unimportant, seven being most important. The following table represents the rankings in order of importance.

		Mean	Standard Deviation
1.	ability to be perceived as honest	6.59	.61
2.	ability to listen	6.39	.84
3.	ability to persuade	6.22	.66
4.	ability to generate alternative solutions	6.17	.85
5.	ability to state one's position	5.94	1.05
6.	ability to compromise	5.88	.85
7.	ability to be perceived as cooperative	5.88	2.28
8.	ability to keep negotiation focused	5.82	1.13
9.	ability to question	5.72	1.22
10.	ability to answer	5.71	1.04
11.	ability to perceive deception	5.61	2.74
12.	ability to perceive a bluff	5.44	1.42
13.	ability to recognize a final offer	5.33	1.37
14.	ability to be perceived as sensitive	5.24	1.48
15.	ability to incorporate evidence	5.17	1.91
16.	ability to be perceived as adamant	5.00	1.36
17.	ability to interpret nonverbal cues	4.83	1.65
18.	ability to bluff	4.06	1.30
19.	ability to deceive	2.22	2.04

TABLE TWO

SEATING PREFERENCES

TASK	PREFERRED SEATING		
CONVERSATION			
COOPERATION			
CO-ACTION			
COMPETITION			

ENDNOTES

Sean Patrick O'Rourke is pursuing concurrent degrees at the University of Oregon: a doctorate in rhetorical communication and a J.D. in law. Janet Sparrow Trapp is also a doctoral candidate in rhetorical communication at the University of Oregon.

[1] Cornelius J. Peck and Robert L. Fletcher, "A Course on the Subject of Negotiation," Journal of Legal Education 21 (1968), 196; Harry T. Edwards and James J. White, The Lawyer as a Negotiator: Problems, Readings and Materials (St. Paul: West Publishing, 1977), p. 8.

[2] Edwards and White, p. 9.

[3] E. Gordon Gee and Donald W. Jackson, "Current Studies of Legal Education: Findings and Recommendations," Journal of Legal Education 32 (December 1982), 481.

[4] Linda L. Putnam and Tricia S. Jones, "The Role of Communication in Bargaining," Human Communication 8 (Spring 1982), 262-80.

[5] Leonard C. Hawes and David H. Smith, "A Critique of Assumptions Underlying the Study of Communication in Conflict," Quarterly Journal of Speech 4 (December 1973), 423-35; David W. Johnson, "Communication and the Inducement of Cooperative Behavior in Conflicts: A Critical Review," Speech Monographs 41 (March 1974), 64-78; Putnam and Jones, 262-80.

[6] P. H. Gulliver, Disputes and Negotiations: A Cross Cultural Perspective (New York: Academic Press, 1979), p. 48.

[7] Ibid., pp. 122-79.

[8] Charles E. Osgood, "Graduated Unilateral Initiatives for Peace," in Conflict Resolution: Contributions of the Behavioral Sciences, ed. Clagett Smith (Notre Dame: University of Notre Dame Press, 1971), pp. 515-25; Howard Raiffa, The Act and Science of Negotiation (Cambridge: Harvard University Press, 1982); Ottomar J. Bartos, Process and Outcome of Negotiations (New York: Columbia University Press, 1974).

[9] Putnam and Jones, p. 264.

[10] Jeffery Z. Rubin and Bert R. Brown, The Social Psychology of Bargaining and Negotiation (New York: Academic Press, 1975), p. 20.

[11] Thomas C. Shelling, The Strategy of Conflict (Cambridge: Harvard University Press, 1963); Anselm Strauss, Negotiations: Varieties, Contexts, Processes, and Social Order (San Francisco: Jossey-Bass Publishers, 1978); Paul Swingle, The Structure of Conflict (New York: Academic Press, 1970); Dean G. Pruitt, Negotiation Behavior (New York: Academic Press, 1981).

[12] Bartos, p. 273.

[13] Raiffa, p. 21.

[14] David H. Smith, "Communication and Negotiation Outcome," The Journal of Communication 19 (September 1969), 254.

[15] Nancy A. Reiches and Harriet B. Harral, "Argument in Negotiation: A Theoretical and Empirical Approach," Speech Monographs 41 (March 1974), 46.

[16] Allen A. Turnbull, Lloyd Strickland and Kelley G. Shaver, "Medium of Communication, Differential Power, and Phasing of Concessions: Negotiating Success and Attributions to the Opponent," Human Communication Research 2 (Spring 1976), 267.

[17] Linda L. Putnam and Tricia S. Jones, "Reciprocity in Negotiations: An Analysis of Bargaining Interaction," Communication Monographs 49 (September 1982), 172-89; Warner Wilson, "Reciprocation and Other Techniques for Inducing Cooperation in the Prisoner's Dilemma Game," Journal of Conflict Resolution 15 (1971), 165-95; Alan L. Sillars, "The Sequential and Distributional Structure of Conflict Interactions as a Function of Attributions Concerning the Locus of Responsibility and Stability of Conflict," in Communication Yearbook 4 ed. Dan Nimmo (New Brunswick: Transaction Books, 1980), pp. 217-35; Rubin and Brown; Pruitt; William Anthony Donohue, "An Empirical Framework for Examining Negotiation Processes and Outcomes," Communication Monographs 45 (Augut 1978), 247-57; William A. Donohue, "Analyzing Negotiation Tactics: Development of a Negotiation Interact System," Human Communication Research 7 (Spring 1981), 273-87; Gerald I. Nierenberg, Fundamentals of Negotiation (New York: Hawthorn Books, Inc., 1973); Chester L. Karrass, The Negotiating Game (New York: World Publishing, 1972); Joyce Hocker-Wilmot and William Wilmot, Interpersonal Conflict (Dubuque: Wm. C. Brown Company, 1978).

[18] Richard Rieke, "Argumentation in the Legal Process," in Advances in Argumentation Theory and Research, eds. J. Robert Cox and Charles Arthur Willard (Carbondale: Southern Illinois Press, 1982), p. 372.

[19] Peck and Fletcher, p. 196. Interestingly, Peck and Fletcher, as well as James J. White, "The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Act of Negotiation," Journal of Legal Education 19 (1967), 337-53; when teaching the course in negotiation, enlisted the aid of psychiatrists (not communication scholars!) to obtain an understanding of the interpersonal dynamics of negotiation.

[20] Robert Matthews, "Negotiations: A Pedagogical Challenge," Journal of Legal Education 6 (1953), 93-101.

[21] White, pp. 348-49.

[22] Nancy A. Coleman, "Teaching The Theory and Practice of Bargaining to Lawyers and Students," Journal of Legal Education 30 (1980), 470-93; Bernard M. Ortwein, "Teaching Negotiation, A Valuable Experience," Journal of Legal Education 31 (1981), 108-27.

[23] Gary Bellow and Bea Moulton, The Lawyering Process: Negotiation (Mineola: The Foundation Press, 1981); Harry T. Edwards and James J. White, Problems, Readings and Materials on the Lawyer as a Negotiator (St. Paul: West Publishing Co., 1977).

[24] This attorney may or may not care to know that the adversary she describes is often referred to as an "anal personality" type. White, in an already cited article says "The anal personality is one characterized in part by a stubborn, unyielding attitude."

[25] Putnam and Jones, pp. 276-77.

[26] Interestingly, the attorney's rating of this variable corresponds quite closely with those of 32 senior lending officers of a large U.S. bank who were asked to rate the importance of 34 traits that they believed would characterize an effective negotiator. There, nonverbal skills ranked 29th in importance, see Raiffa, pp. 119-22.

[27] Considerable dispute exists as to what percentage of communication is nonverbal. The issue is immaterial for our purposes here; suffice it to say that nonverbal communication is a major portion of face-to-face interaction. On nonverbal communication, see generally, Albert Mehrabian, Silent Messages, 2d. ed. (Belmont: Wadsworth, 1981); Mark L. Knapp, Nonverbal Communication in Human Interaction, 2d. ed. (San Francisco: Holt, Rinehart, and Winston, 1978); Dominic A. LaRusso, The Shadows of Communication: Nonverbal Dimensions (Dubuque: Kendall/Hunt, 1977); and Edward T. Hall, The Silent Language (Garden City: Doubleday, 1959).

[28] See P. H. Gulliver, pp. 122-26.

[29] Alan C. Filley, *Interpersonal Conflict Resolution* (Palo Alto: Scott, Foresman, 1975), p. 81.

[30] I. Altman, *The Environment and Social Behavior* (Belmont: Wadsworth, 1975), pp. 111-20; see also Knapp, pp. 114-51.

[31] Filley, p. 82

[32] Knapp, p. 124.

[33] Hall, p. 163.

[34] R. Sommer, *Personal Space: The Behavioral Basis of Design* (Englewood Cliffs: Prentice-Hall, 1969), pp. 46-8; N. F. Russo, "Connotation of Seating Arrangements," *Cornell Journal of Social Relations*, 2 (1967), 37-44.

[35] Knapp, p. 118.

[36] M. L. Patterson, "An Arousal Model of Interpersonal Intimacy," *Psychological Review*, 83 (1976), 235-45.

[37] Knapp, p. 132.

[38] F. Strodtbech and L. Hook, "The Social Dimensions of a Twelve Man Jury Table," *Sociometry* 24 (1961), 297-415.

[39] Knapp, pp. 132-33; see also Russo, pp. 37-44.

[40] R. Sommer, "Further Studies of Small Group Ecology," *Sociometry* 28 (1965), 337-48; M. Cook, "Experiments on Orientation and Proximics," *Human Relations* 23 (1970), 61-76.

[41] Cook, pp. 61-76.

[42] Edwards and White, pp. 372-73.

[43] Putnam and Jones, p. 269; see also Zartman and Berman, pp. 28, 153.

[44] Ronny E. Turner, Charles Edgley, and Glen Olmsted, "Information Control in Conversations: Honest is not Always the Best Policy," *Kansas Journal of Sociology* 11 (Spring 1975), 69-89.

[45] Mark L. Knapp and Mark E. Comadena, "Telling it Like it Isn't: A Review of Theory and Research on Deceptive Communications," Human Communication Research 5 (Spring 1979), 270; Carl Camden, Michael Motley, and Ann Wilson, "Deception in Interpersonal Communication," paper presented to the Western Speech Communication Association, Albuquerque, New Mexico, February 1983.

[46] Frank J. Monteverde, Richard Paschke, and James T. Tedeschi, "The Effectiveness of Honesty and Deceit as Influence Tactics," Sociometry 37 (1974), 583-91.

[47] Ibid., p. 590.

[48] Ibid.

[49] Ibid.

[50] Jerome M. Chertkoff, et al., "Reactions When teh Honesty or Dishonesty of the Other Bargainer is Discovered," Social Behavior and Personality 5 (1977), 21-31.

[51] Mark L. Knapp, Roderich P. Hart, and Harry S. Dennis, "An Exploration of Deception as a Communication Construct," Human Communication Research 1 (Fall, 1975), 15.

[52] Ibid., p. 22; R. E. Kraut, "Verbal and Nonverbal Cues in the Perception of Lying," Journal of Personality and Social Psychology 36 (1978), 380-91; Albert Mehrabian, "Nonverbal Betrayal of Feeling," Journal of Experimental Research in Personality 5 (1971), 64-73.

[53] P. Ekman, W. V. Friesen, and K. R. Scherer, "Body Movement and Voice Pitch in Deceptive Interactions," Semiotica 16 (1976), 23-7; Streeta, et al., "Pitch Changes During Attempted Deception," Journal of Personality and Social Psychology 35 (1977), 345-50.

[54] G. Baskett and R. O. Freddle, "Aspects of Language Pragmatics and the Social Perception of Lying," Journal of Psycholinguistic Research 3 (1974), 112-31; R. E. Kraut, "Verbal and Nonverbal Cues in the Perception of Lying," Journal of Personality and Social Psychology 36 (1978), 380-91.

[55] Knapp, Hart, and Dennis, p. 25.

[56] Knapp and Comadena, p. 279.

[57] P. Ekman and W. V. Friesen, "Detecting Deception from the Body or Face," Journal of Personality and Social Psychology 29 (1974), 288-98.

[58] Nierenberg, p. 139.

[59] P. T. Rankin, "The Measurement of the Ability to Understand Spoken Language," Dissertation Abstracts 12 (19126), 847.

[60] Ronald B. Adler and George Rodman, Understanding Human Communication (New York: Holt, Rinehart and Winston, 1982), pp. 99-100.

[61] Bert Bradley, Fundamental of Speech Communication, 3d. ed. (Dubuque: W. C. Brown, 1981), pp. 205-6.

[62] Paul E. Nelson and Judy C. Pearson, Confidence in Public Speaking (Dubuque: W. C. Brown, 1981), p. 254.

[63] Adler and Rodman, p. 99.

[64] Ibid., p. 98.

[65] Nierenberg, p. 140.

[66] Gerard I. Nierenberg; Chandler Washburne, "Retortmanship: How to Avoid Answering Questions," ETC.: A Review of General Semantics 26 (March 1969), 69-75. On answering, see also Robert F. Nofsinger, Jr., "On Answering Questions Indirectly: Some Rules in the Grammar of Doing Conversation," Human Communication Research 2 (Winter 1976), 172-81.

[67] Nierenberg, p. 119.

[68] Washburne, p. 70.

[69] Ibid., p. 72.

[70] See for example: Erwin P. Bettinghaus, Persuasive Communication, 3d. ed. (New York: Holt, Rinehart and Winston, 1980); Winston L. Brembeck and William S. Howell, Persuasion: A Means of Social Change, 2nd. ed. (Englewood Cliffs: Prentice-Hall, 1976); Gary Cronkite, Persuasion: Speech and Behavioral Change (Indianapolis: Bobbs-Merrill, 1965); Charles V. Larson, Persuasion: Reception and Responsibility, 2d. ed. (Belmont: Wadsworth, 1979); Mary John Smith, Persuasion and Human Action (Belmont: Wadsworth, 1982).

[71] Nierenberg, p. 118.

[72] Roderick P. Hart and Don M. Burke, "Rhetorical Sensitivity and Social Interaction," Speech Monographs 39 (June 1972), pp. 75-91.

[73] See for example: Edwards and White, pp. 137-38; Rubin and Brown, pp. 262-88; Pruitt, pp. 19-20; Gulliver, pp. 162-68; Reiches and Harrel, p. 38; Donohue, 1981, pp. 275-87; Turnbull, Strickland, and Shaver, pp. 262-70.

[74] Turnbull, Strickland, and Shaver, pp. 262-63.

[75] Rubin and Brown, p. 272.

NEGOTIATION, MEDIATION, AND ALTERNATIVE DISPUTE RESOLUTION

Carl M. Moore

Cheryn Wall

It has been referred to as a movement(1), a quiet revolution, a growth field,(2) and "a breeze blowing fitfully through our litigous society."(3) Whatever it is called, there appears to be a substantial shift in how our society is selecting to resolve disputes. Legal differences increasingly are being settled outside the courts. This shift may have occurred because the court system failed to efficiently deal with the demands on its capacity (the accepted norm is that the system is too slow and too costly [4]), traditional--non-judicial--dispute resolution mechanisms like the family and church are waning,(5) and/or because citizens are dissatisfied with the traditional legal process and the win-lose outcomes it produces and desire more community (or even "tribal") mechanisms for resolving differences between neighbors.

The current shift towards developing alternative dispute resolution mechanisms is not new--"in many and varied communities, over the entire sweep of American history, the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals"(6)--but it is certainly vigorous. Ronald L. Olson, Chairperson of the American Bar Association's Special Committee on Alternative Dispute Resolution, explains that

> Varying types of agencies for non-adjudicatory settlement of disputes through arbitration, mediation, and conciliation are evolving. To date, 170 communities in forty states have established "dispute centers" (also known as "neighborhood justice centers," "citizen's dispute settlement program," and "night prosecutor's programs"). In addition, more than 400 private agencies and city governmental entities are involved in providing informal processes to resolve citizens' problems. The federal government legitimized and encouraged the development of alternative methods for resolving civil and criminal disputes by enacting the Dispute Resolution Act (P.L. 96-190) on February 12, 1980. Presently the Special Committee is assisting 18 states in developing state dispute resolution legislation.(7)

Frank E. A. Sander's seminal description(8) suggests that there are two categories of alternative activities for resolving minor disputes: small claims courts and dispute settlement outside the courts. According to Sander, disputes outside the courts include disputes between individuals (addressed in neighborhood justice centers and by the arbitration of small claims) and disputes between individuals and organizations (which are managed by ombudspersons and administrative grievance procedures). To his category of disputes outside the courts, we would add disputes between organizations (including activities like minitrials where each company presents their case to a neutral advisor[9]).

Usually when "alternative dispute resolution" is mentioned it refers to the creation of "dispute centers." Charts one through eight provide a profile of what the dispute centers are like currently.

o While they are located in a wide range of communities, most of the centers serve a population larger than a quarter-of-a-million people.

o Over half of the programs are relatively new and have been in operation for less than three years.

o Their funding, which ranges from less than $500 to more than $100,000 per annum (over half of the programs receive more than $50,000), is primarily provided by government sources.

o They primarily use lay citizens to mediate interpersonal disputes.

o The disputes are referred to them by the existing criminal justice system--courts, judges, clerks, state and district attorneys, prosecutors, and law enforcement officers.(10)

The new dispute resolution programs, including the dispute centers, primarily have utilized two interpersonal communication "orientations"(11)--negotiation and mediation. And that, of course, is where the interests of this paper meld with the program planners' assignment to us. The remainder of the paper, therefore, will define negotiation and mediation, describe the process "stages" which they generally follow, respond to the three papers which have addressed the topic of negotiation and lawyering, and then raise a series of questions which could (and maybe even should) be addressed by scholars and teachers interested in conflict resolution.

Our assignment as a respondent encouraged us to cover topics other than those addressed in the papers. We introduced the alternative dispute resolution "movement" because it is having an increasingly large impact on the judicial system, it utilizes negotiation and mediation extensively (almost exclusively!), and there is a need to conduct appropriate research and develop useful pedagogical materials. The "movement" has grown so rapidly and so recently there is a substantial need to describe how disputes are being resolved in order that decisions can be made to continue with the same procedures or modify them in order to increase effectiveness. Important interdisciplinary questions should be raised regarding what other disciplines, like speech communication, can add to the ways disputes are settled and how mediators are trained to play their roles. Conversely, it would be informative to determine what the experiences of the alternative dispute resolution movement can teach disciplines like speech communication and social psychology about interpersonal communication and conflict resolution. We have selected to include mediation because it is a natural extension of negotiation; we would argue that you can not fully discuss negotiation without considering the prospect of the need for mediation.

NEGOTIATION

In a "negotiation,"

o **multiple parties**,
o who are **interdependent**,
o **seek to influence** each other
o by means of **exchanging information** in various forms (including arguments, appeals, threats, and promises)
o over **time**, suggesting that the parties are likely to learn about each other and about themselves and, as a result, positions may change.

Negotiation encourages cooperation in order to reach a mutually agreeable outcome. Ideally, the interests of all the parties--as well as others who have a stake in the issue--will be met completely. The minimum criterion for an appropriate negotiated outcome is its genuine acceptance by the parties. Another mark of an agreement's success is that it is consistent with the broader community's view of fairness; an objective observer would judge that the interests of the parties (and stakeholders) had been adequately taken into consideration.

Negotiation is often confused with arbitration or adjudication. Arbitration and adjudication are processes by which parties submit their differences to settlement by an outside intervenor. In negotiation the parties do not give up the authority to control their own outcome.

Negotiations usually pass through four distinct stages, each involving a range of tasks.

Stage 1: Organizing for Negotiations

During this stage, persons responsible for the negotiations undertake some or all of the following tasks. They:

- o recognize the conflict and define the boundaries of the dispute,
- o determine and accept the parties involved in the dispute,
- o select a mediator (optional),
- o conduct team-building activities (optional),
- o decide on the place (the "arena") where the negotiations will be conducted, and
- o set the time frame.

Stage 2: Informal Exchange of Information

During this stage, parties to the negotiations perform some or all of the following tasks. They:

- o define the rules which govern the negotiation,
- o develop their respective issues,
- o request information from the other party or parties,
- o exchange information with the other party or parties,
- o prepare preliminary positions, and
- o present their own preliminary positions and react to those of the other party or parties.

Stage 3: Bargaining Process

During this stage, parties to the negotiations perform some or all of the following tasks. They:

- o draft formal positions,
- o resolve differences over formal positions,
- o select a mediator (optional), and
- o draft agreements.

Stage 4: Review and Monitoring of Agreement

During this stage, parties to the negotiation perform one or both of the following tasks. They:

- o review and adopt the agreement, and
- o monitor performance/compliance.

A typical negotiation usually involves some of the tasks in all four stages. The tasks are often undertaken in the order listed here. It should be remembered, however, that the preceeding is descriptive and not prescriptive; not all the tasks are performed in any one negotiations process; the tasks are not always performed in the same sequence; and, occasionally, certain of the tasks are repeated.(12)

MEDIATION

Central to the success of many complex negotiations are the services of a mediator. When disputing parties are willing but unable to resolve their differences through negotiations, they may turn to an impartial agent--preferably one trained in the art of mediation--to help them reach an agreement. Mediation is a process in which a mediator works with negotiating parties in an attempt to find a mutually satisfactory solution to the dispute and to obtain a set of commitments with which the participants can reasonably live.

Mediation is most often thought of as an "intervention." That is, usually only after the negotiating parties have reached an impasse is the mediator brought in. However, in the case of complex disputes, it is often preferable to have the mediator present from the beginning. That is almost always the case at the dispute centers. The earlier the mediator is able to perform the central functions of clarification and management of ideas, the more likely it is that negotiations will conclude successfully.

The principal advantage of early involvement by the mediator is that a broader range of alternatives for settling the dispute is likely to be available. The parties will be more open to change because they have not yet made substantial commitment to a particular plan.(13)

Larry Ray, Staff Director of the ABA's Special Committee on Alternative Means of Dispute Resolution, has described "Six Stages of Mediation" (chart nine) typically followed by a dispute center. The stages involve the following tasks.

Stage 1: Introduction

o Greet the parties assigning them specific seats.

o Identify yourself and the parties; clarifying names and refer to parties comparably and in the names they desire.

o Establish an informal relaxed atmosphere by offering water, paper and pencil, and time.

o Explain the purpose of mediation and ascertain their willingness to participate.

o Clarify ground rules and explain the reason for them.

(1) Only one party speaks at a time.
(2) Speak directly to the mediator.

o Assess the parties. Are both ready to begin? Is either overly anxious, nervous, or upset? Are any severe emotional, drinking, drug, health problems present? Is any preliminary calming necessary?

Stage 2: Problem Determination

o Request one party to begin. Usually the one who contacted the program first is asked to begin. Explain the reason for one party to begin.

o Note this is the story development phase. This may be the first time the parties have discussed in a problem solving conducive atmosphere the stituation.

o Actively listen to the speaker. Take notes if helpful. Use listening techniques such as restatement, echo, and non-verbal responses.

o Pay close attention to the behavior and body movements of both parties.

o If necessary, stop the party's narration and calm both parties or assure the other speaker of his/her opportunity to speak.

o Clarify party's narration by asking questions or restating.

o Maintain information flow by focusing the party's narration. Keep the mediation progressing.

o Summarize the first party's story. In summarizing, the mediator may defuse tensions by restating story eliminating disparaging comments or descriptions.

o Check with party to see if you have understood the story. This aids all three of you to understand.

o Thank the first party for his/her contribution. Remind him/her of ground rules, noting second party's patience, if appropriate.

o Repeat the process with the second party always paying close attention to the behavior of both.

o Ask questions in a neutral fashion. Make use of open and closed questions when appropriate.

o After both party's stories and your individual summaries, check with both. Are they okay? Any calming or explaining necessary?

Stage 3: Problem Identification

o Ask each party to assist in identifying the presenting problem.

o Inquire (probe) into underlying, fundamental issues which may affect the presenting problem-be at the root of the complaints.

o Define problem by restating and summarizing party's statements.

o Conduct private meetings if necessary. Explanations should be given to both parties as to what will transpire during and after the private meetings.

o Summarize areas of agreement and disagreement.

o Assist parties in prioritizing issues and demands.

Stage 4: Generation and Evaluation of Alternatives

- Inquire of each party a list of possible alternatives or options in helping to resolve the situation.
- Restate and summarize each alternative.
- Check and recheck with each party the workability of each alternative.
- Note the unworkability of an alternative if that is the case.
- Suggest other possible alternatives in general terms if an impasse is reached.
- Encourage the parties of the probability of success.
- Suggest a break or a second mediation if impasse is reached.
- Ask parties to "try-out" possible solutions.

Stage 5: Selection of Alternatives

- Encourage parties to select the alternative which appears to be workable by both.
- Check its workability. Assist parties in planning a course of action to implement alternative.
- Note the amount of progress parties have made.
- Rephrase alternatives selected for increased understanding.

Stage 6: Agreement (Resolution)

- Summarize agreement terms.
- Check viability and reality with each party. Secure their assent to what has transpired.
- Ask each if there are any other issues which need be discussed.
- Assist parties in specifying terms of the resolution. Where? When? How? and Who?
- Explain process of follow-up.
- Establish each party time of follow-up.
- Emphasize that agreement is theirs, not yours.
- Congratulate the parties on their reasonableness. Encourage parties on the workability of their resolution.(14)

RESPONSE TO PAPERS ON NEGOTIATION AND LAWYERING

We received two papers and a book. The book first. Norbert S. Jacker's EFFECTIVE NEGOTIATION TECHNIQUES FOR LAWYERS, to be published later this year by the National Institute for Trial Advocacy, is another sign that law schools realize that prospective attorneys need to know about negotiation. The "1983 Law School Directory of Dispute Resolution Programs"(15) reveals that forty-three law schools offer courses in negotiation, thirty-eight schools offer courses in interviewing, counseling, and negotiation, and fifty-nine schools offer courses in arbitration. The profiles of selected law schools' course offerings reveals that:

o The principle objective of the courses is to introduce alternatives to adjudication to the student. The courses typically include both theory and practice. If they err in any direction it is to be practical (emphasize skills) rather than conceptual.

o The courses tend to cover a wide range of processes, including arbitration, mediation, negotiation, conciliation, and collective bargaining.

o While the context is most often negotiation between lawyers, some courses include negotiation with clients and multiple-party negotiations.

o Very often the negotiation course deals exclusively with labor negotiations. Occasionally they will cover other negotiation foci, including personal injury litigation (and settlements), plea bargaining, corporate takeovers, civil problems faced by the military, intra-governmental, and international.

o Those courses that include mediation cover a wide spectrum of applications, such as community and neighborhood disputes, criminal complaints, environmental and land-use problems, interpersonal disputes (family, divorce, child custody, etc.), contract formation, personal injury, and commercial disputes (business and estate planning, landlord-tenant complaints, consumer complaints, etc.).

o The methods used to teach the courses include assigning/discussing case studies, experimenting with models in simulated situations, videotaping students when they role-play mock negotiation situations, extended group (team) work in solving an assigned problem, attending arbitration hearings, and field placement and internships (including work with dispute centers).

o The courses may go full term (semester, quarter) or may be conducted as intensive workshops (e.g., over two weekends).

o The assignments for the courses include papers, arbitration briefs, arbitration awards, performace in class simulations, critiques of peers, and research memoranda on selected topics.

o Course materials include scholarly articles in legal and non-legal publications, case studies, guest speakers (experts), and audio-visual materials. The materials and speakers are from the disciplines of law, economics, social psychology, decision theory, and anthropology.

So Jacker is writing for an increasingly interested and sophisticated professional audience.

Our general response is that Jacker has provided a useful "how to do it" manual (which the paper by O'Rourke and Trapp say is needed). As a primer on negotiation tactics for young lawyers, it is down to earth, nitty-gritty, and covers essentials of negotiating that should be considered. His references are up-to-date.

David Smith, as you know, identifies problems with the economic model as a basis for theory and research on negotiations. His thesis is expressed best at the end of the paper.

> The idea of exchange and the economic model of man as rational are deeply rooted in Western thought. They have provided a basis for much productive work. It would be foolish to dismiss them. At the same time limitations in their fundamental notions limit their application to communicative behavior in general and to negotiation in particular. (p. 19)

He provides a reasonable critique and introduces the reader to a number of writers who have been thoughtful about this methodological perspective. Two additional writers not included in Smith but who are also frustrated by the application of the economic model to negotiation are Gulliver(16) and Raiffa(17).

One way of rephrasing a portion of Smith's criticism is in terms of the distinction that typically is made between quantitative and qualitative research methods. In order to "produce knowledge" it is necessary to (1) generate questions/hypotheses, (2) test questions/hypotheses, and, if appropriate, (3) predict behavior. Quantitative researchers in speech communication have rather smugly taken the position that humanistic, critical, qualitative methodologies are only useful to generate questions/hypotheses and that it is up to them--with their mathematically oriented quantitative methodologies--to test and to predict. The application of game theory to human behavior, in this case negotiation behavior, is one very clear instance where highly quantitative methodologies are useful for generating questions/hypotheses--inferences can be made based on their applications--which can only be confirmed by common sense and personal experience.

We would find Smith's paper less of a strawperson argument if he had illustrated how the economic model is utilized currently to study negotiation, particularly by scholars in speech communication and the law, and what are the unfortunate or unproductive actual consequences of taking that theoretical perspective.

We have the most to say about the paper "From the Communication Profession: Communication Strategies and Research Needs in Legal Negotiating and Bargaining" by Sean O'Rourke and Janet Trapp. As the title suggests, this paper has a broad scope and it provides the careful reader with a wealth of useful, up-to-date references on negotiation. We did not find a single major recent source that was excluded. We have no quarrel, therefore, with their first section which reviews selected literature as it applies to legal negotiation.

The second section reports the findings of a survey they conducted of the perceptions that practicing attorneys have of legal negotiations. O'Rourke and Trapp are aware of some of the reasons why the results of their sample are likely not to be generalizable to a broader population of lawyers. We are concerned that the reader of the paper does not know how negotiations was defined in the survey, what questions were asked and how they were phrased, or what specific behaviors are included in their finding that "60% of [the attorneys'] practice involved negotiations." In that only relatively recent graduates of a law school were polled, the generalizability of their results is further weakened. Most young lawyers are not likely to have that much "hands on" negotiation experience. If they are in a firm, they are usually relegated to research and writing briefs at first. If an attorney is a sole practitioner, s/he may not have an opportunity, early in her career, to handle the types of cases where negotiations are central to the resolution of the case. Therefore, what the types of cases were and the role of the questionnaire respondent in those cases is very important to understanding their replies. Those attorneys most likely to be negotiating and to have most experience with negotiation probably were not polled. Nevertheless, the survey as a first step does offer testable propositions about what is normative behavior regarding attorneys negotiating and what skills they perceive they need.

In their third section, titled "communication strategies," they identify communication skills that legal negotiators ought to possess (or at least might consider acquiring). Throughout this section they make claims which in our judgment should be tempered.

Certain interesting arguments have the potential for being misleading. For example, in the context of asserting that the choice of an arena is important to negotiations, they strongly imply that negotiations should "use...neutral territory to facilitate problem-solving."(p. 7) Choosing a neutral site is not likely to be an option in most lawyer-to-lawyer negotiating, Jacker makes a strong case why it is beneficial for an attorney to meet in the opposing attorney's office (pp. 25-26), but what is most important is that we do not have any way of assessing the value of the advice. This is a claim that should be tested. Is the choice of an arena (even a neutral arena) important to legal negotiation? A researcher, by using experience, observation, and/or controlled experimentation, may be able to tell whether the variable of choice of an arena may have an effect on the outcome of a legal negotiation. Will more active listening result in better negotiated outcomes? What kind of improved results can be expected if a negotiator uses certain types of questions? This section implies that acquiring certain information or skill will result in more effective negotiating. Our preference is that this section was used to identify questions which still need to be answered.

They infer that the "strategies" they mention can and should be taught to prospective negotiators. We question whether all of the strategies are teachable. Can all skills, including what seem to be intuitive or instinctive capacities like the use of personal space and the ability to detect deception, be taught? And, if teachable, are they necessarily useable. Again, we would have preferred questions. Do they have any reason to believe that if a prospective attorney is provided with new information about nonverbal cues (such as eye contact, seating arangements, use of space/zones) that will result in more effective negotiations? Will the attorney who has been provided with such information do a better job of negotiating (however defined) than the one who has not been provided with it? Once having such knowledge, can it be used in a systematic way? It is important to realize that knowledge about something does not necessarily result in useable knowledge.

There are additional research activities by speech communication scholars which the authors might have mentioned in their section on "research needs." For example, O'Rourke and Trapp say that their

> ...purpose is to indicate those skills a negotiator can employ that are persuasive in legal negotiations. Unfortunately, there is little literature in interpersonal persuasion that can provide us with this type of information.(p. 16)

We suggest they begin their search by consulting the rather extensive writing by communication scholars on compliance-gaining strategies (18). The research on credibility/reputation/ethos would provide them with advice to give an attorney regarding how to be perceived as "honest." A Michigan State University research team was thoughtful about the problem of deception in a legal setting(19) and a reliable scale has been developed for ascertaining the argumentativeness of individ(20)

One specific skill which can be utilized to keep the negotiation focused (p. 16) would be the use of a "group memory."(21) Specific strategies for generating alternative solutions and stating one's position can be found in *Getting To Yes*.(22)

The O'Rourke and Trapp paper would have benefited from a clearer definition of legal negotiation (e.g., the title is misleading because negotiating and bargaining are used interchangeably throughout the paper) and from a model or description of legal negotiation: Where does it occur? Between Whom? To what end(s)? In our judgment the Jacker book also should describe the range of legal negotiating. This is necessary because one can not generalize across all matters just because they occur within the legal context. Negotiations differ regarding strategies, goals, and techniques, depending on the case involved. For example, negotiating a commercial contract involves different considerations than a felony plea bargaining situation. The distinction between criminal and civil cases may very well require different negotiating strategies. In criminal cases the personnel are governmental, the time constraints are effected by statute, a premium is placed on filtering out of the system those cases which should not use the resources of the criminal justice system or which can be handled by an "easier" method of dispute resolution so the full panoply of justice is reserved for selected criminal cases. Civil cases, on the other hand, use private attorneys, use time as a strategy ("justice delayed is justice denied"), and utilize alternatives such as minitrials and compulsory/binding arbitration so jurys will be reserved for more complex cases (which is also a strategic decision, in part effected by the complexity of the case). Hence, these different contexts must be considered.

Any model or description would be especially useful if it could take into account why negotiation (or mediation or alternative mechanisms for dispute resolution) is utilized by lawyers. For example, what are the formal rules of the system which encourage and/or facilitate negotiation? Or, what are the informal accomodations and exchanges among attorneys, and those who participate in the system of justice, and what impact do they have on the use of negotiation?(23)

QUESTIONS

We have already raised or inferred some questions in this paper, particularly about negotiation and lawyering.

o What is attorney negotiating behavior? Where does it occur? With whom? Over what kinds of issues/cases?

o Why do attorneys negotiate? What in the formal or informal system accounts for their negotiating activity?

o What communication skills do experienced attorneys perceive as necessary?

o Which negotiating skills/strategies can and should be taught to prospective attorneys?

o Which strategies, if used by attorneys, may effect the outcome of a negotiation?

Our own discussion of negotiation, mediation, and alternative dispute resolution gives rise to additional questions.

o What are the distinct processes currently utilized to resolve disputes outside the courts?

o Is there a useful "profile" of which disputes should and should not be "handled" by each type of alternative dispute resolution?

o When a variety of approaches are utilized to resolve disputes (e.g., in the dispute centers) are there discernable differences in the effectiveness of the approaches? And, if there are differences, can it be determined what activities and/or communication behaviors account for the differences?

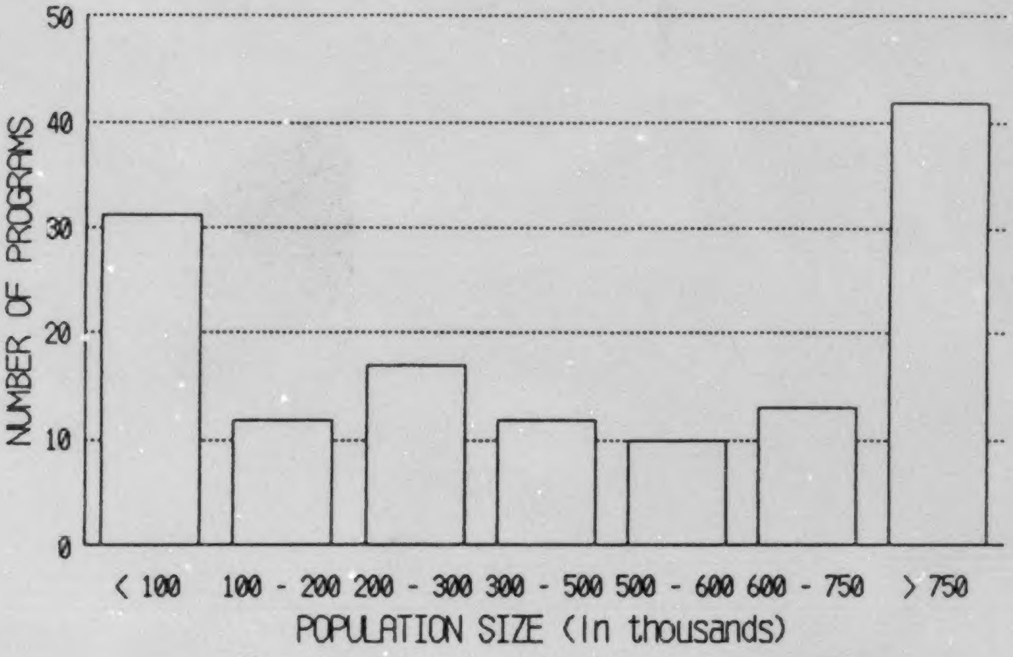
o Is one segment of the population more or less effective as mediators? For example, would attorneys (who play an adversarial role) be effective?

o Are some approaches to training mediators more effective than others?

o What specific skills/strategies should mediators be taught?

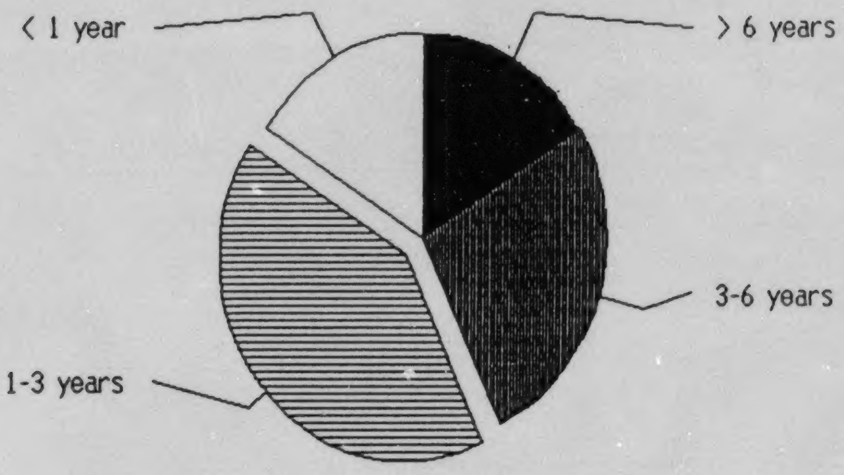
o Do all the disputes which come to the dispute centers require the assistance of a mediator?

Chart 1: POPULATION SIZE



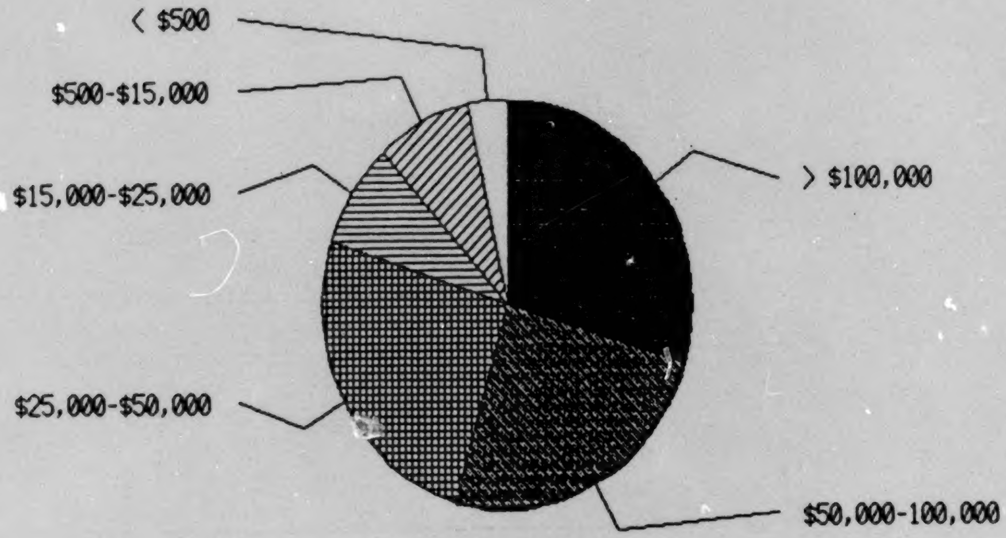
Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

Chart 2: YEARS OF OPERATION

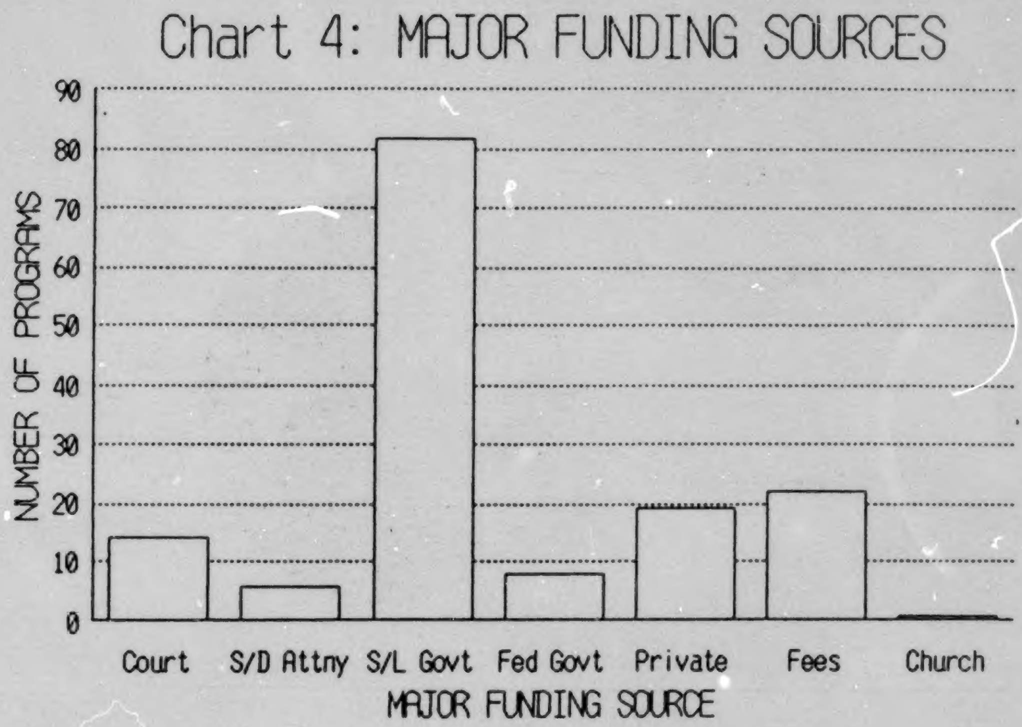


Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

Chart 3: PROGRAM BUDGET

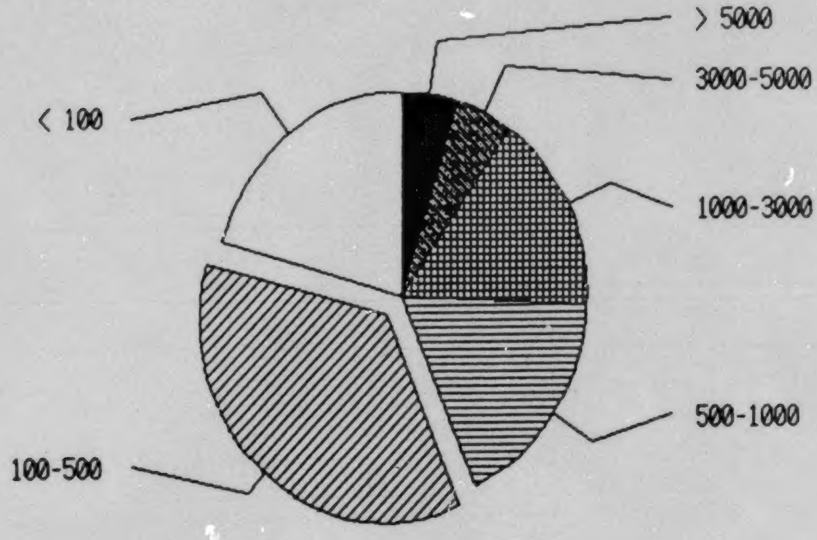


Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

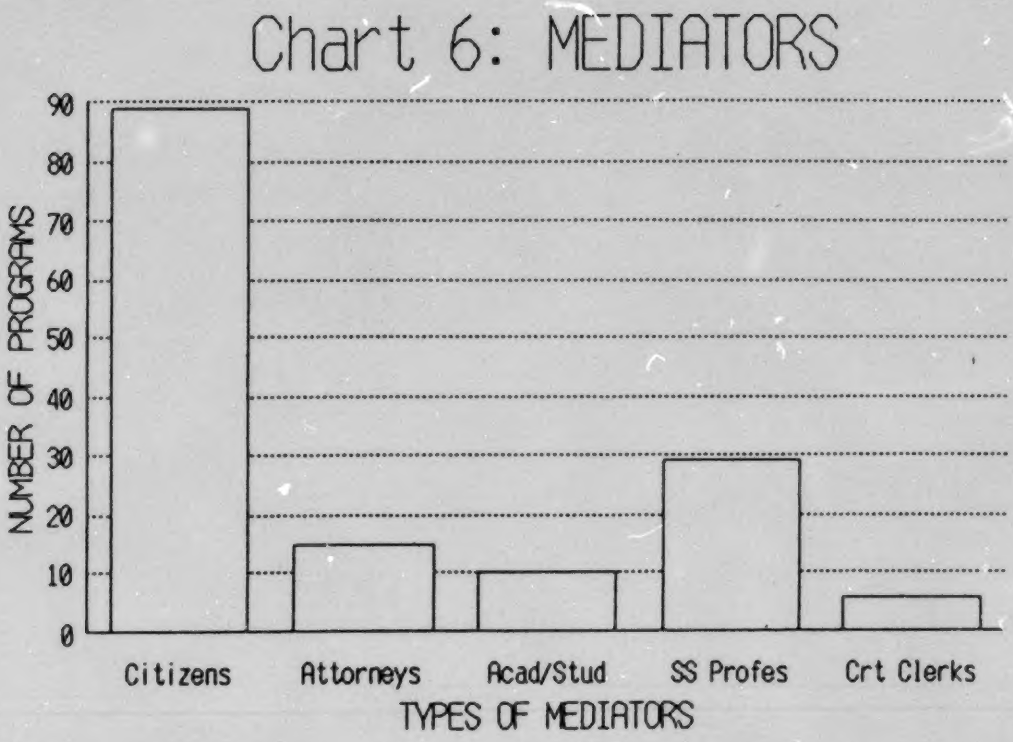


Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

Chart 5: ANNUAL CASELOAD

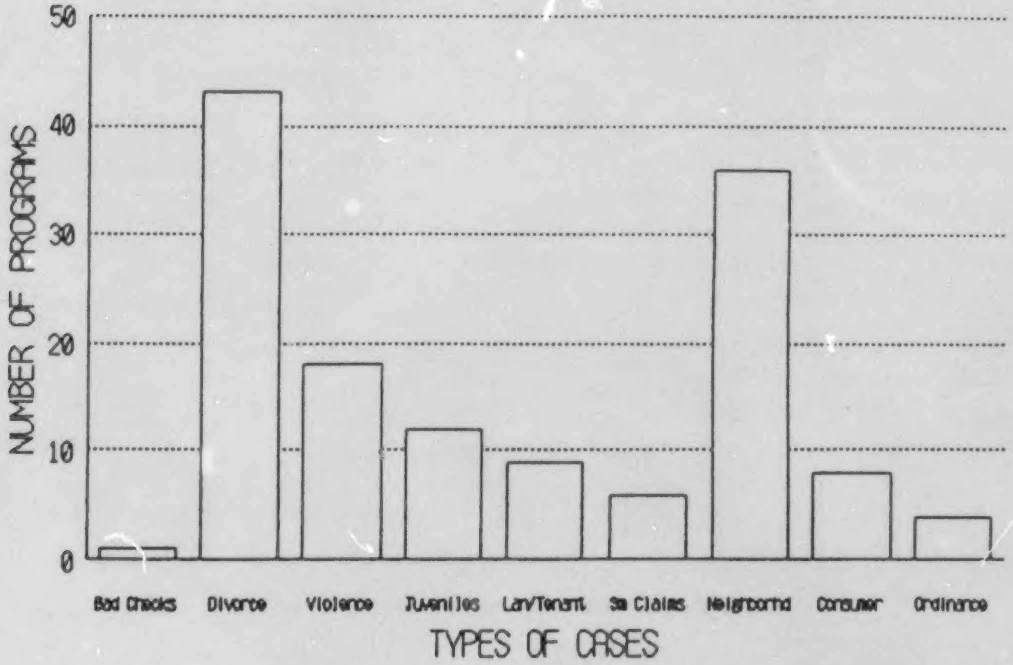


Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).



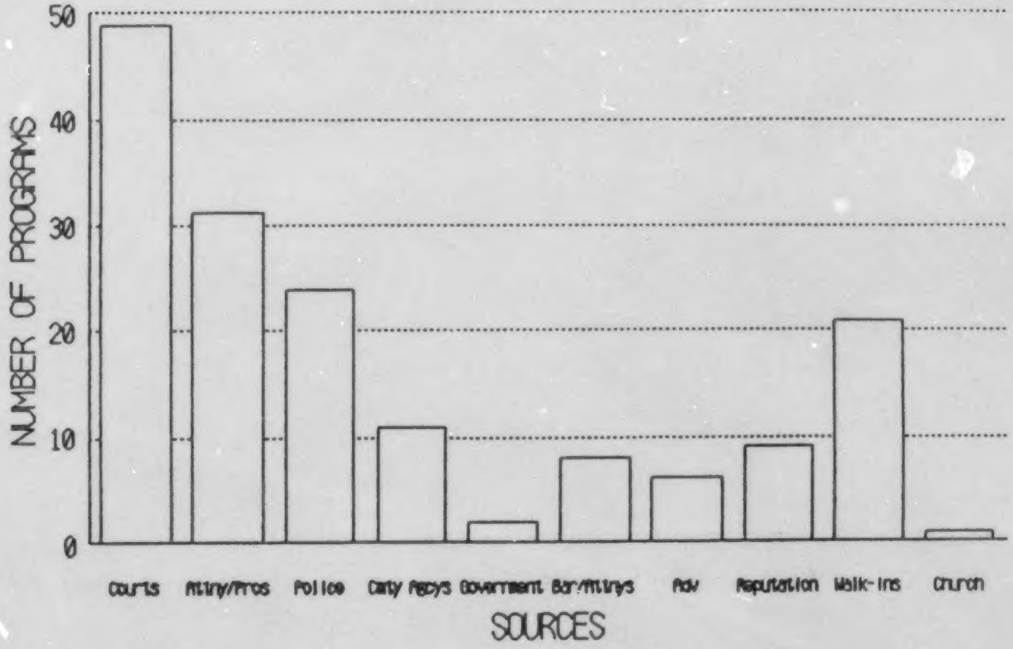
Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

Chart 7: MAJOR CASE CONCENTRATION



Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

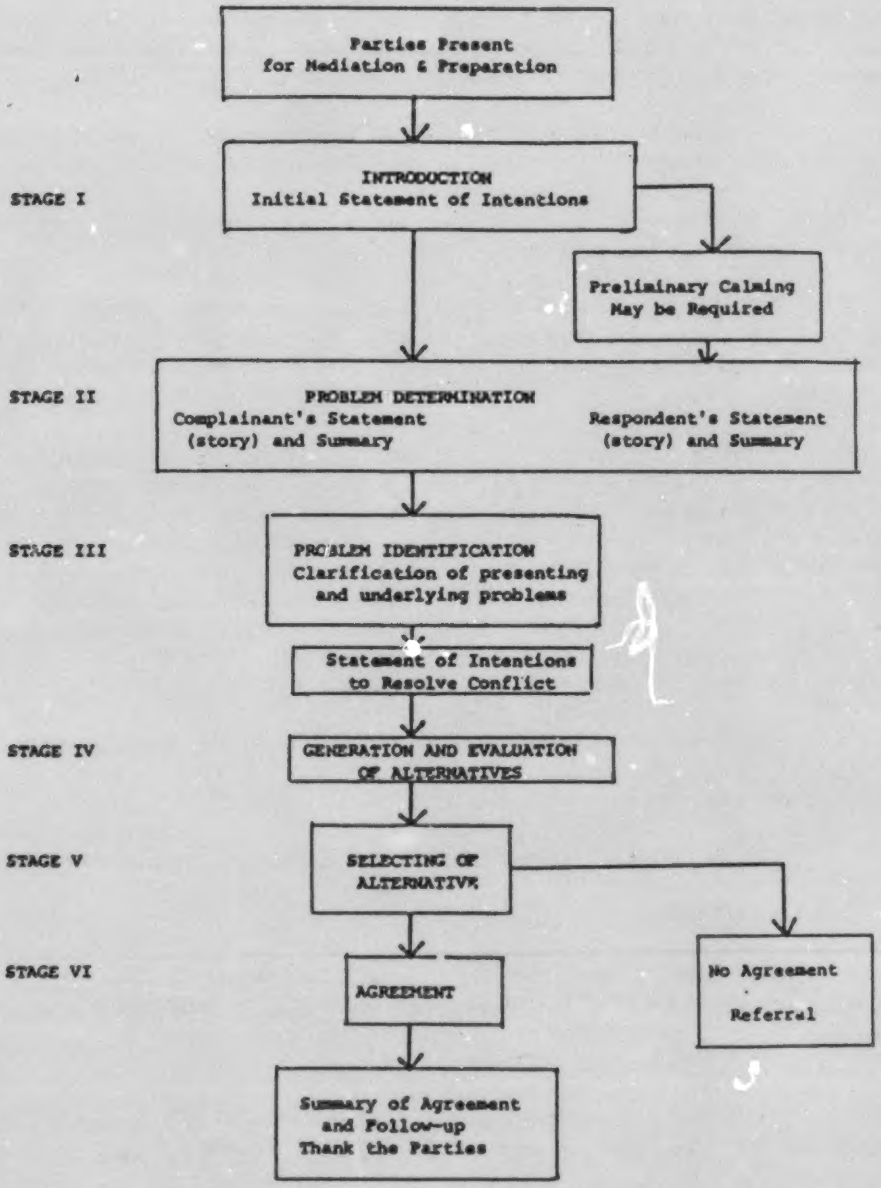
Chart 8: MAJOR REFERRAL SOURCE



Source: Larry Ray (Editor), Dispute Resolution Program Directory, 1983 (Washington, D.C.: American Bar Association, 1982).

CHART 9:

SIX STAGES OF MEDIATION


Parties Present
for Mediation & Preparation
STAGE I
INTRODUCTION
Initial Statement of Intentions
Preliminary Calming
May be Required
STAGE II
PROBLEM DETERMINATION
Complainant's Statement
(story) and Summary
Respondent's Statement
(story) and Summary
STAGE III
PROBLEM IDENTIFICATION
Clarification of presenting
and underlying problems
Statement of Intentions
to Resolve Conflict
STAGE IV
GENERATION AND EVALUATION
OF ALTERNATIVES
STAGE V
SELECTING OF
ALTERNATIVE
STAGE VI
AGREEMENT
No Agreement
Referral
Summary of Agreement
and Follow-up
Thank the Parties

LR 3/82 ABA

Notes

Carl M. Moore is an associate professor and Cheryn Wall is a graduate student in the School of Speech Communication, Kent State University.

(1)Larry Ray, "The Alternative Dispute Resolution Movement," *Peace and Change* 8 (Summer 1982), 117-28.

(2)Tamar Lewin, "New Alternatives to Litigation," New York *Times* (October 28, 1982), pp. 25-26.

(3)Jethro K. Lieberman, "Staying Out of Court" (a review of *Justice Without Law?* by Jerold S. Auerbach [New York: Oxford University Press, 1983]), New York *Times* (June 5, 1983), Book Review, p. 13.

(4)For example, Lewin claims that the nationwide average is twenty months for a civil suit to get from filing to trial in the Federal Courts and that "it takes about four years to get to trial in Los Angeles Superior Court." Lewin explains that the costs of minitrials--an alternative dispute resolution mechanism--are "less than one-tenth those of litigation" and that the reason they are getting "so much attention is that the transactional costs of doing legal business are so enormous."(p. 26)

(5)Ronald L. Olson, "Foreward," in Larry Ray (editor), *Dispute Resolution program directory, 1983* (Washington, D.C.: American Bar Association, 1982).

(6)Jerold S. Auerbach, as quoted in Lieberman, p. 13.

(7)Olson.

(8)*Report on the National Conference on Minor Disputes Resolution, May 1977* (Washington, D.C.: ABA Press, 1978).

(9)Lewin, pp. 25-26.

(10)The charts are based on data appearing in Ray, *Dispute Resolution Program Directory, 1983,* pp. 202-203.

(11)We are hesitant to refer to them as methodologies as there is such substantial variation in their application.

(12)Carl M. Moore and Cheryn Wall, *Negotiation and Mediation* (Dayton, OH: Kettering Foundation, 1982), pp. 3-5.

(13)Moore, pp. 5-7.

(14)Ray, "The Alternative Dispute Resolution Movement," pp. 121-22.

(15)Kevi Brannelly (editor), (Washington, D.C.: American Bar Association, 1983).

(16) P.H. Gulliver, *Disputes and Negotiations: A Cross Cultural Perspective* (New York: Academic Press, 1979).

(17)Howard Raiffa, *The art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982).

(18)For example, see Gerald Miller, Frank Boster, Michael Roloff, and David Seibold, "Compliance-Gaining Message Strategies: A Typology and Some Findings Concerning Effects of Situational Differences," *Communication Monographs* 44 (March 1977), 37-51; Margaret L. McLaughlin, Michael J. Cody, and Carl S. Robey, "Situational Influences on the Selection of Strategies to Resist Compliance-Gaining Attempts," *Human Communication Research 7* (1980), 14-36; Richard L. Wiseman and William Schenck-Hamlin, "A Multidimensional Scaling Validation of an Inductively-Derived Set of Compliance-Gaining Strategies," *Communication Monographs* 48 (December 1981), 251-270; William Schenck-Hamlin, Richard Wiseman, and G.N. Georgacarakos, "A Model of Compliance-Gaining Strategies," *Communication Quarterly* 30 (Spring 1982), 92-100.

(19)For example, see Gerald R. Miller and Norman E. Fontes, *Videotape on Trial* (Beverly Hills: Sage Publications, 1979).

(20)For example, see Dominic A. Infante, "Trait Argumetativeness as a Predictor of Communicative Behavior in Situations Requiring Argument," *Central States Speech Journal* 32 (Winter 1981), 265-272; Dominic A. Infante and Andrew S. Rancer, "A Conceptualization and Measure of Argumentativeness," *Journal of Personality Assessment* 46 (1982), 72-80.

(21) How to keep a group memory is clearly described in Michael Doyle and David Straus, *How to Make Meetings Work* (New York: Playboy Paperbacks, 1977), pp. 125-42.

(22) Roger Fisher and William Ury, (Boston: Houghton Mifflin, 1981).

(23) For an example of such an analysis, on an important type of negotiating within the criminal justice system--plea bargaining, see a report by the Institute for Law and Social Research (INSLAW) titled *Plea Bargaining: Who Gains? Who Loses?* (1978).

RESPONSES TO LEGAL NEGOTIATING AND BARGAINING PROGRAM

Lucy Keele: The kind of work that O'Rourke and Sparrow did strikes me as limited from the fact that you send out a questonnaire that has communication variables that we might talk about in the process of negotiation. Attorneys answering that questionnaire picked those variables because those were the choices you gave them. But, as a matter of fact, in one particular negotiation the lawyers were successful because their firm was bigger than the other firm and they simply said, "We'll bury you at all cost." But, that's not the response on the survey. They want to think they are good negotiators; they don't want to say, "None of the choices you gave us apply; we used sheer power on them. I'm personally not very good at negotiaton, but my firm has 300 people in it and we spent a lot of money and we just threatened the hell out of them!" Here is another scenario. A criminal attorney gets a deal for his or her client, and the client agrees to testify against the other person. The response to your questionnaire should be "You know, I really struck a bargain there. My client in response for his testimony is probably not going to face the electric chair." What is never understood was that a third time offender and the horror of returning to prison was so paramount in the client's mind that he would have sold his mother, communication variables aside. Yet the negotiator responding to a questionnaire says, "Oh, I think this is important and I think that is important," but the "this" and "that" have nothing to do with anything. That is my concern. Questionnaires, while useful, just like O'Rourke's and Sparrow's paper is useful, still have some serious limitations. Where we must do is to look at this creature (negotiation) in its own habitat. I think you must get into those rooms and watch what is happening. For instance, while two lawyers are bargaining, their senior partners are in another part of the room signalling and that has a lot to do with what is happening. This must be observed first-hand. What you can never see on a survey are some of these other variables. I think we have to see this. We are not getting into the closed negotiation sessions because we don't know attorneys, or we can't get in because they say it is too difficult, or they are afraid you will let it out that they really would have settled for $50,000 or whatever. Yet, wouldn't it be interesting to add to this other valuable work we're doing to say, "I've obtained this information about negotiation; here is what I saw in this particular setting?"

Gordon Zimmerman: I've talked to a number of attorneys in the State of California who do most of their negotiating with the judge present. Complex civil litigation routinely creates settlement conferences, and, in California they have courses in pre-settlement conferences. In those courses the question is asked as to whether or not a lawyer's behavior changes when a judge is present. Likewise, do judges try to analyze the different behavioral styles of the negotiation? While lawyers are figuring out whether they are negotiating in front of a settling or a litigating judge, the judges are doing the same thing with the attorneys. I would hope that future research would include the input of judges and their settlement styles, and how this changes lawyers' behaviors and the eventual willingness of clients to settle.

Francis McGovern: In the leturing I've done to federal judges, there is a 50/50 split between judges who become involved themselves in the negotiating process and judges who refuse to become involved under the theory that if they are involved in the negotiating, they've got to get some quasi-confidential information that may affect their role as a judge if the case eventually goes to trial. So, one interesting issue you raise is, what, in fact, are the ramifications if judges become involved in the negotiation, the negotiation is aborted for whatever reasons and the judge has to play the role of neutral umpire during the trial of the case? This is a major problem that exists for the judiciary today.

Leroy Tornquist: The threat of litigation is paramount in the negotiation process. So, the best negotiators are often the best trial lawyers. It goes back to the power position. Those lawyers who know they can carry a case forward into litigation also know that they can get a good result in negotiation. That's another factor I haven't heard very much about.

Philip Davis: I'd go even further with that point by encouraging research on the relative states of the attorney and how that affects negotiation. I'm a young lawyer. I haven't practiced a lot and it's hell for me to negotiate. Nobody knows if I'm good in a courtroom yet and nobody knows if I'm willing to carry through. So, it's hell for me to negotiate because they want to find out how effective I am as a litigator and the only way to do that is not negotiate and force me to trial. What happens after ten or eighteen years when I've successfully litigated cases? Does my status as a negotiator change? Is there a necessary "rite of passage?" I'd be interested in seeing research on old lawyers versus young lawyers and how that affects the ability to negotiate settlements. Let me make two other observations. One is that I've had judges and lawyers tell me since law school that the good cases that go to trial get settled and the bad cases that should settle go to trial. I'd be interested in seeing research on the kinds of cases that do get settled that shouldn't and the kinds of cases that go to trial. My other observation is that I'd like to see you do research on the jury as a negotiating body, what juries do inside the jury room. Lawyers don't get to see that. I used to listen to it because I clerked for a federal judge and I used to hear what juries would do in jury rooms and it was fascinating to me. You'd hear yelling and screaming and then it would get quiet, and then you'd hear more yelling and more screaming and it would get quiet again. The game we used to play waiting for the jury to come in was the relationship between how much noise they made and how close they were to a verdict. We were never right, absolutely never right! I'd love for speech communication scholars to get inside the jury room and see what kinds of variables influence juries as they negotiate.

Robert Feldhake: In response to the comment about good negotiators and good trial attorneys, I'm not sure as a practitioner who spends about 50 percent of his time in civil litigation, you can say that I'm a better negotiator or bargainer in relation to the number of law suits I've tried. I think we presume the ability to try a case in front of a jury automatcially lends to us some credibility as a negotiator or, more importantly, lends to us the ability to negotiate. The fact that we can advocate in front of a panel does not mean we can establish credibility when negotiating. I have known countless attorneys who can try cases every day for the rest of their lives, but when you take them into a forum for negotiation, they often will be hard line on cases where they should never be hard line. They adopt the tactic that they would prefer to try the case. Of course, the other reaction which makes some sense is that if you wait until you try a couple of cases and you lose those cases, I doubt if you are in the position to be a good negotiator.

On a different matter though, in all of this discussion about negotiation and bargaining, I was wondering if there would be a time frame variable? When is negotiation and bargaining most effective? One of the things I know I have done and found really valuable is that once the complaint is filed and once the answer is filed, I will draft a rather lengthy paper and it will say "this case will go to trial in five-and-a-half years." I stop approaching the case as a lawyer; we now approach it as business persons. "You will expend so much money on defense, or you will expend so much of your client's money on cost. The probability of success I perceive is 75 percent. If I discount that by 50 percent where is what I believe is your chance of recovery." I have found considerable success taking that negotiating approach and saying," "I don't care if your client's position is true or it is false. I also know what the probable jury response is to those defenses." I wonder if any of the panelists here have had a chance to consider whether we can more effectively negotiate at the inception of a lawsuit where hard line positions have been maintained, or where clients are litigating not on matters of principle, but on matters of economics? Is there a reason to negotiate early as opposed to waiting five years and just as you are about to approach litigation?

Norbert Jacker: I don't know the answer to whether that has been considered in the literature, but one of the problems that early negotiation presents is that you might not have all the facts you need to negotiate. Having gone through the discovery process, you may very well find that if you have all the facts, it would have made no sense from your client's point of view to negotiate at all. You've got a risky situation in early negotiation. You may dispose of the matter in a cost effective way as far as minimizing the lawyer's time and the client's expenses. At the same time, you run the risk of not knowing a weakness on the other side that could change your entire judgment of the settlement that you have proposed.

Marsha Grand: I happen to be the wife of an attorney, Richard Grand of Tucson. Strictly by osmosis and being involved with attorneys, negotiation is one of the largest parts of their practice. There isn't one attorney I know that keeps track of what he does in his general work of negotiation to identify things that are successful and things that do not work. I hear lawyers talking all the time about negotiation, but none of them have ever sat down and said, "How come I got 'X' amount from the same guy in a similar case four months ago?" It seems that part of the problem you are addressing is the attorney's communication skills and strategies in negotiation. Although lawyers may keep very good records of finances and costs and various things like that, they don't keep any records of their negotiating styles. I think it would be helpful for any lawyer to keep track of how things work.

Donald Wall: The first consideration I want to address is what is legal negotiation? There is no generic legal negotiaton; the term varies in meaning from one person to another. There is a wide variety of types of negotiation. Ther are many different tactics and many different approaches which a lawyer can take when negotiating legal matters. And the different tactics or approaches a lawyer may take depends on the type of matter being negotiated. For example, there are a number of studies dealing with the effectiveness, motivaton and purpose of criminal plea bargaining negotiation. The approach here will be vastly different from the negotiation of a merger of two large corporations which, in turn, will be different from labor/management negotiations. The approach will again be different if you are trying to settle a personal injury case or negotiating a domestic relations problem about visitation or custody privileges. You have to look at the type of negotiation before you can generalize. What I would suggest is studies devoted to legal negotiation ought not to concentrate on the broad scope of negotiation per se, but they should be broken down into different categories based on the types of matters being negotiated.

A second consideration concerns the numerous variables to be analyzed in understanding legal negotiation. The tactics and strategies used depend on the many variables. For example, is this an adversarial or non-adversarial negotiation? Are the parties against each other where the lawyer for one side doesn't want to spend any money and a lawyer on the other side wants to extract as much as he can? Or, is this a cooperative negotiation as in the case of underwriters, financiers, bankers and a municipality trying to come up with a package to finance a new stadium? The approach will be different if the negotiating partners are not adversaries. There is also the consideration of the forum for negotiation. Where is this matter being negotiated? Is it pending in court as the litigation actually commences? Is the negotiation conducted in the judge's chambers or in one attorney's office? As the forum changes, what, if any, are the rules and procedures that might be applicable? Additionally, what are the consequences of non-resolution? In many instances, the parties assume they have to come to some settlement. What happens if they don't? Will there be a trial? You will have a totally different attitude if you know you have five years before the case will come before a judge and/or jury than if the suit has already been filed and litigation is imminent. It makes a big difference what the consequences are. Is there an alternative dispute resolution procedure you will put into motion if your attempts at negotiation fail? The consequences of non-resolution ought to make a difference in terms of selecting the most appropriate negotiation strategies. These are just a few of the many variables that need to be considered and researched in order to discover tactics and approaches to various types of legal negotiation.

JURY SELECTION AND JURY BEHAVIOR

PROGRAM COORDINATOR
PROGRAM CHAIRPERSON

JOAN B. KESSLER
DEPARTMENT OF SPEECH COMMUNICATION
CALIFORNIA STATE UNIVERSITY - NORTHRIDGE
COLLEGE OF LAW
LOYOLA UNIVERSITY - LOS ANGELES

This program has been dedicated to Vincent Follert, one of Professor Kessler's former research assistants at Loyola University in Chicago. Dr. Follert (Ph.D., Wayne State University) was conducting jury research and teaching at Western Illinois University until his untimely death in June, 1983 at the age of 29.

REVIEW OF RESEARCH ON JURY SELECTION AND JURY BEHAVIOR

K. Phillip Taylor

John W. Wright

Research on jury selection and behavior is annotated well through 1976 in two comprehensive volumes. Erlanger's 1970 essay provides basic bibliographic material for the period before 1969.[1] In 1977, The American Judicature Society published a complete bibliography covering jury research published between 1969 and 1976.[2] The present review will focus on research published since 1976. In this way, the authors hope to complement the efforts of earlier reviewers and provide an up-to-date summary of the nature and scope of current jury research. The present review covers the most widely available books and journals where jury research is reported.[3] Additional jury research may be found in the various state Bar journals and the numerous law school journals and reviews.

THE JURY SYSTEM

The 1966 publication of The American Jury served as a bench mark for scholarly interest in jury research.[4] It provided invaluable data about the court system in the United States. It summarized the results of an exhaustive research program conducted by the University of Chicago Law School. It also provided interested scholars with a solid foundation upon which subsequent hypotheses could be grounded concerning the nature and operation of the trial process. A second important contribution to an understanding of juror behavior that appeared before 1977 was Psychology and the Law.[5] This volume resulted from a conference sponsored by the Battelle Seattle Research Center. The conference studied psychological and social factors in legal process and provided a tremendous amount of quantitative information on jury deliberation, juror perception of trial testimony and jury selection.[6] Other valuable references for jury research include Simon's The Jury and the Defense of Insanity, her edited work, The Jury in America and the more recent The Jury: Its Role in American Society.[7] One of the more worthwhile journal issues in recent years was the Autumn, 1980 issue of Law and Contemporary Problems. This entire volume contained articles concerning various aspects of the American jury.[8]

The Supreme Court always holds the greatest potential power over the court system in this country. Some observers feel that the Burger Court has not exercised a positive influence on the nation's jury system. Schultz noted the Court's constriction of the right to a jury trial when it refused to grant jury trials to juveniles or to state civil proceedings.[9] Some writers contend that Chief Justice Burger has led in the effort to limit the ability of the jury to render judgment.[10] Another observer noted that the Chief Justice "has for many years taken his message to professional and lay audiences: the jury system does not work and, in any case, we cannot afford it."[11] It has been argued, however, that even if jury trials were less efficient than bench trials, they provide values that outweigh their inefficiency and cost. Jury trials provide "individualization of justice, a check on judicial power, citizen education, a means by which community values may influence the justice system, and a basis for popular acceptance of judicial decisions."[12]

JURY SELECTION

Few topics related to jury research have received more scholarly attention in recent years than the pros and cons of social scientific jury selection techniques. Behavioral researchers, pollsters, trial lawyers and judges all seem to have strong opinions concerning the value of these procedures. Simon summarized her analysis of current jury selection practices rather tersely: "Members of the bar believe that if they had enough information about each juror's background and status, they could predict with a high degree of accuracy how each potential juror would decide a particular case . . . The irony of all this is that these beliefs have so little basis in fact."[13] Suggs and Sales agree with this contention. They concluded that empirical data do not support the reliability or validity of juror selection techniques proposed by social scientists.[14] They correctly identify a major weakness in jury selection based on demographic, attitudinal and opinion surveys when they observed that demographic sampling "cannot determine whether the particular prospective juror being examined holds the same opinions and attitudes as his/her socioeconomic group."[15]

Suggs and Sales cited several areas of research in suggesting that social scientists can provide valuable insight into the reevaluation and development of voir dire techniques.[16] Research has indicated, for example, that due to status and role considerations, attorneys are better suited to conduct voir dire than judges. Judges may unintentionally bias jurors. Research has also indicated that voir dire should be conducted with juros individually since collective sessions seem to prohibit disclosure.

While a public distance seems most appropriate during the trial, closer distances--from three to six feet--facilitate interaction during the trial. Participants in litigation have traditionally avoided casualness, but research has revealed that excessive formality during voir dire may significantly hinder self disclosure. Suggs and Sales also suggested that positive reinforcement of jurors is essential during voir dire, and they concluded that attorneys who practice self disclosure are more likely to elicit responsiveness in jurors.

In a separate article, Suggs and Sales stressed the need for increased emphasis on nonverbal communication during voir dire.[17] All nonverbal behavior including paralinguistic cues and kinesics should be coded and analyzed in order to more fully assess juror attitudes and emotions. Since nonverbal behavior includes rate of speech, pauses, latency of response, facial cues, eye contact, and all body movements Suggs and Sales suggested that attorneys utilize secondary observers in order that all behavior can be coded during voir dire.

While some authorities recommend caution in the use of public opinion polls and jury surveys, others see social scientific techniques as valuable predictors of human behavior.[18] But regardless of one's opinion about the utility of social science data and data-gathering techniques, courtroom doors are opening to social scientists and their expertise with a resulting effect on the composition of juries throughout the country.[19]

The term systematic jury selection has been used in recent years to describe the use of social scientific techniques to increased the objectivity and open-mindedness of the jury. Many advocates hope to accomplish even more; the creation of a jury favorable to their side in the dispute.[20]

Mackey has observed that the selection process begins during the pretrial planning as the attorney determines the type of juror best suited to hear the case. The actual observation of prospective jurors begins as they arrive at the courthouse. This will permit an astute attorney an opportunity watch "what the jurors do, how they are dressed, who they are."[21]

Faust and Carlson studied New York juries to assess the impact of age, race, sex, occupation and income on attitudes toward law and the administration of justice. They found that older persons, males, whites, and white collar workers are generally over represented on juries. The variables of age and education exert opposite forces on juror attitudes. While age has the greatest single influence in determining the conservatism of a jury, the education level of jurors produces a strong liberalizing effect.[22]

Mills and Bohannon used post trial questionnaires in their study of the relationship between juror characteristics and verdicts. They reported a demographic link between a juror and the verdicts exists but will differ depending on the type of case. They found "age was the best predictor of verdicts for murder cases; age and education for rape cases; and sex for robbery cases."[23] Their findings were not totally supported by a similiar study of Florida juries. Moran and Comfort found that demographic and personality measures were equally valid behavior predictors for male jurors while personality variables were the best predictors of verdicts by female jurors.[24] Hepburn, however, argued that a juror's verdict is also affected by the perceived strength of the evidence in the case. The perception of the evidence is, in turn, related to the juror's case-relevant attitudes.[25]

Brosnahan emphasized the need to systematize the voir dire process. He offered a set of criteria designed to identify proplaintiff and prodefendant jurors in First Amendment trials. Proplaintiff jurors typically have modest education levels, read very little, are politically conservative--especially on the issue of censorship, and are generally unsympathetic toward mass media. A juror who ultimately identifies with characteristics of the plaintiff are likely to be strongly proplaintiff.

Prodefendant jurors are typically heavy readers with at least some college education and strong language skills. Teachers and other professionals, writers, and persons whose occupations require following complex instructions were described as highly prodefendant.

Brosnahan suggested use of a First Amendment expert, linguistic professor, and local journalist to help plan trial strategy, and he concluded that cases which are tried to specific, carefully chosen juries are typically most successful.[26]

The overall process of jury selection has received considerable analysis. Hawrish and Tate interviewed trial lawyers to ascertain how the variables sex, age, occupation, and appearance are used by attorneys to discriminate among prospective jurors.[27] Ratings of the four variables were made (from the defense perspective) in four types of trials--fraud, rape, issuing a false prospectus, and murder. In all four trial situations, men were rated as significantly more preferrable than women, and senior citizens were generally least desirable for jury service. Younger persons were slightly more acceptable than all other age groups. Persons of high socio-economic status were undesirable for fraud trials, and jurors pictured in rebellious dress were less acceptable than those dressed modishly or conservatively for a false prospectus trial.

While no other relationships were statistically significant, older attorneys seemed to prefer jurors of higher social status and conservative dress. Despite these findings, attorneys with considerable trial experience preferred middle and lower socio-economic classes and also revealed slight preferences for young and modishly dressed jurors.

Attorneys consistently respond that religion, place of residence, criminal records, marital and family status, and ethnic origin were important factors in discriminating among prospective jurors.

A number of articles advocated implementation of social science techniques to improve the process of jury selection. McConahay used a mathematical model to construct an "ideal jury." Each juror was observed and rated on an authoritarian scale, and predispositions favoring defense or prosecution were assessed through observation of nonverbal behavior. McConahay concluded that formal selection techniques can help assure representation and help determine whether pre-trial publicity should result in a change of venue. A possible increase in cohesiveness was also observed among jurors who were systematically chosen. McConahay added that the most important advantages may be increased confidence of attorneys and increased awareness of defendant concerns on part of the jury.[28]

The use of mock juries, shadow juries and jury services are expensive techniques that facilitate the jury selection process.[29]

Shell tested whether computerized surveys of jury polls, scientifically selected questions, and careful analysis of the courtroom behavior of prospective jurors facilitate jury selection. His observations included psycho-analysis of jurors' nonverbal behavior. The techniques seemed to help attorneys overcome established myths and ask more relevant questions. Shell acknowledged, however, that the process is expensive due to the high cost of the survey.[30]

JUROR BEHAVIOR

Juror propensity to pre-judge litigants is a behavioral phenomenon of considerable interest to the legal community. The impact of pre-trial publicity provides a potentially potent influence on juror attitudes and behavior. One study reported the effect on jurors who read newspaper articles containing either prejudicial or non-prejudicial information regarding a case. The impact of negative news stories was clearly revealed. Eighty percent of those exposed to prejudicial information rendered guilty verdicts or exhibited a majority of guilty votes. Those who read non-prejudicial articles rendered only 39 percent guilty verdicts. Jurors exposed to prejudicial information also discussed the articles more during deliberations, preceived the defendant as more untruthful and were more likely to assign motives for the incident under litigation. Jurors who read prejudiced material also believed the articles significantly influenced them and other jurors to vote against the defendant.[31]

Nagel also found that preconceived notions seem to overly influence verdict decisions by affecting juror's interpretation of specific facts and law. In a methodological study designed to assess propensity to convict, Nagel found that in criminal cases jurors applied a standard of guilt substantially lower than the reasonable doubt standard of law. He concluded that the standard of guilt could be raised and made more uniform through judicial instructions.[32] The problem, however, may reside with the instructions themselves. The research team at the Institute for Study of the Trial in Florida assessed juror comprehension of oral instructions used in criminal cases. One hundred and sixteen members of actual venires served as subjects in the experiment. Item analyses indicated that those areas where the instructions were most difficult to understand included the definition of the crime, the meaning of legal terms such as information, reasonable doubt, and material allegation, and the correct application of the concepts of reasonable doubt and witness credibility.[33]

Constantini surveyed potential jurors in three actual cases to analyze opinions indicative of prejudgment.[34] Strong bivariate relationships were revealed between knowledge about a specific case, general attitudes on crime, gender, and education, and two measures of propensity to convict. Multivariate discriminate function analysis enabled the researchers to use the four variables to predict pre-judging opinions. By far, knowledge about a specific case was the most significant predictor. The more a prospective juror knew about a case, the more likely he/she would pre-judge the defendant guilty. The results suggested that pre-trial publicity may be especially harmful to defendants. Women and conservatives were more likely to pre-judge a defendant, and college graduates were less likely to do so. These findings may be linked to specific personality variables. For example, Bray and Noble found a shift toward greater severity of punishment by high authoritarians in mock jury deliberations. Low authoritarians evidenced an opposite tendency toward increased leniency.[35]

Jorasky polled jurors in order to identify traits of veniremen who ultimately become jury foremen. No one reliable trait was identified, but foremen were more likely to be males and/or persons perceived to be verbally fluent, friendly, and bold. Jorasky concluded that defense attorneys, particularly in murder trials, may want to exclude male veniremen strongly displaying these traits in order to maximize chances for a hung jury.[36]

The importance of increasing the likelihood for a hung jury is revealed in a three-year California study. Flynn found that 40 percent of the deadlocked cases were dismissed; 34 percent were resolved by guilty pleas and 26 percent were retried. The retrials produced an 18 percent conviction rate while 8 percent were acquitted.[37]

JURIES AND THE LAW

Six-member juries have the focus of considerable discussion since Williams v. Florida.[38] Many observers have directly or indirectly advocated return to a twelve-member standard. Sperlich, for example, argued that the Williams decision violates historical and constitutional tradition.[39] He referred to empirical evidence showing that six-member juries are functionally inequivalent and likely to result in significantly more convictions, fewer hung juries, and less representativeness and community participation.[40] Cost was suggested as the only significant concern of those advocating reduction of jury size. Sperlich also argued that individual jurors are often more reticent to participate in deliberations when jury size is smaller. This renders six-member juries less likely to overcome bias of particular jurors.

Beiser and Varrin compared data from six and twelve-member juries of civil trials covering a two-year period.[41] They discovered that despite no major differences in the liklihood of ultimately reaching a verdict, six-member juries reached a settlement more quickly and trials were generally shorter. However, six-member juries found significantly fewer cases in favor of the plaintiff, and made lower awards. Beiser and Varrin concluded that while time may be saved, six-member juries probably bias the trial against the plaintiff.

Although the debate over the superiority of twelve-member juries continues in the social science literature, Grofman's review of recent U.S. Supreme Court cases dealing with the constitutionality of jury verdicts when fewer than twelve members deliberate or when the verdict is not unanimous concluded that the "law and social science continue as at best uneasy bedfellows."[42] The Justices who write and apply the law continue in their reluctance to adopt social science standards of probability to resolve specific legal cases.

The Supreme Court has disallowed non-unanimous verdicts in six-member criminal trials. Zeisel examined whether such verdicts in civil trials also violate the spirit of the Constitution even though protections are not extended to civil trials.[43] Since the Court concluded that decisions rendered by juries of less than six members threaten jury trial guarantees, Zeisel reasoned that non-unanimous six-member verdicts offer an even greater threat:

> . . . in a five member unanimous jury there is only one way to obtain a verdict--all five members of the jury must agree on it. The 5-out-of-six jury, in contrast, hides not fewer than 6 different 5-member "juries" . . . [44]

Non-unanimous juries, therefore, bias the trial in favor of the prosecution. Using the same reasoning, hung juries are significantly less likely since one hold-out dissenter out of five is much more likely than two out of six.

Zeisel suggested other implications. Representativeness is automatically reduced since smaller juries contain fewer community subgroups. The liklihood of wrong verdicts (verdicts with which a majority of the total population of potential jurors would disagree) would also increase regardless of the size of the community majority. Because average damage awards of smaller juries involve greater chance variations, they are more likely to arrive at extreme verdict awards. Zeisel also found that non-unanimous six-member juries rank lest in potential for minority jurors to hold ground throughout deliberations and receive adequate representation.

Problems between the judiciary and juries are not restricted to Supreme Court rulings or to questions of jury size. State judges' inquiries into the numerical division of deadlock juries have been upheld in federal district court. In one North Carolina case, the Court of Appeals for the Fourth Circuit held that judicial inquiry into the division of the jury is not constitutionally prohibited and that the totality of the circumstances, including the judicial inquiry, did not violate the defendant's right to a fair trial."[45]

Jury subordination is another topic of concern to those who see jury deliberations increasingly under the control of the trial judge. Special verdicts, directed verdicts and judgments notwithstanding the verdict are all cases where the jury's decision making ability is controlled by the judge.[46]

Jury nullification is a concept that reflects increased power of jurors to apply or ignore the law "when the strict application of the law would lead to an unjust or inequitable result."[47] Becker observed that "no federal court has yet granted a defendant's request for a jury nullification instruction. Few have even permitted a defendant or his or her counsel to argue the concept of jury nullification to the jury."[48] Indiana and Maryland are two states where jury nullification arguments have been accepted. According to Becker, no evidence exists "that informing a jury of its power to acquit by disregarding the law and the evidence will result in anarchy."[49]

The law is also changing the nature and composition of juries. In 1975, the California legislature eliminated all occupational exemptions to increase the probability that juries truly represent a cross-section of society. But changes in the demographics of jury venires has not produced changes in acquittal rates. Brown has conjectured that the small change in verdicts "may only reveal that the role of the jury in affecting outcomes has been greatly reduced relative to that of the judge.[50] This negative view seems to pervade the literature that chronicles the relationship between juries and the law.

JURY PROCEDURE AND ADMINISTRATION

Considerable effort to standardize and streamline jury procedure has been directed toward the development of pattern jury instructions. In his report of this attempt to improve the jury system, Nieland observed that "the judge's charge to the jury is among the most crucial stages of a jury trial."[51] In theory, the jury uses the instructions to determine its verdict. But if a jury is to meet its responsibilities to the litigants in a civil case or to either side in a criminal trial, the language used to instruct the jurors must be understood. Much social scientific data supports the contention that instructions can be developed that meet the dual requirements for legal accuracy and lay utility.

Schwarzer recommended that instructions should be drafted on a case-specific basis using short, simple sentences written in the active voice, devoid of negative forms. Instructions should also be logical and coherent, with emphasis on introductory statements and transitional phrases. Additionally, instructions should be given throughout the trial, as relevant issues evolve, and copies should be provided during deliberations. Schwarzer concluded that a major emphasis on juror understanding of the legal process would render the system substantially more fair and equitable.[52]

Severance and Loftus identified sources of juror misunderstanding before they applied psycholinguistics to the re-writing of present instructions. They concluded that research is available that can be used to accurately and effectively instruct the jury in the law.[53]

Other research suggests that there may be an attitudinal basis for the apparent misunderstanding of jury instructions. Pryor, Buchanan, Taylor and Strawn investigated the relationship between attitudes and cognitions about the law. They found that informing jurors about the law through standard pattern instructions failed to overcome certain misconceptions about the law.[54] These researchers suggested that message strategies designed to alter jurors' negative predispositions could be incorporated into the instructions and thus affect perception and information about the law.

The research team at the Institute for Study of the Trial offered another alteration in jury procedure they term process instructions. "Process instructions differ from standard instructions in that they explain to the jury not only the law, but also provide a step-by-step process for the jury to follow in its deliberations."[55] In an experiment designed to compare the process instruction format with the standard instruction procedure, the final verdicts were the same in all but one case. The major benefit of the process format was in time savings. Process instructed juries required less than half the time to reach a verdict as did those instructed in the usual manner.

The complexity of modern life is mirrored in its legal proceedings.

An increasing number of legal authorities express the opinion that the traditional jury may be unable to cope with the nature and scope of today's complicated and protracted trials. An entire issue of Judicature analyzed this topic.[56] Strawn and Munsterman recommended a procedure similar to process instructions to reduce the complexity and maintain the jury trial tradition. "Rather than litigate everything at once, the only matters litigated are those logically dictated by the order effects of the law."[57] Strawn and Munsterman argued that jurors could be trained in a one or two-day legal seminar and be encouraged to ask questions during the trial. Another advance would be to videotape the judge's instructions and the courtroom testimony for use by the jurors during deliberation. These writers also noted that since communication research has shown the influential impact of initial messages on the formation of preliminary opinions, opening statement of the trial should come from the bench rather than from either counsel.[58]

Elwork, Alfini and Sales' work with jury instructions support earlier findings that suggested the possibility for increased comprehension exists. The major problem, however, resides with the instruction drafting committees. These researchers concluded that "most committees apparently have been content to develop legally accurate instructions without regard for, and sometimes at the expense of, juror understandibility."[59]

Although much can be done to improve the efficiency of traditional juries, Nordenberg and Luneburg suggested two alternatives to the present jury system better suited for highly complex cases. One option they proposed would use specially qualified juries. The qualification considered most important by these writers is a minimum educational level. Nordenberg and Luneburg, both faculty members at the University of Pittsburgh Law School, hold the opinion that "a jury of college educated persons probably would not only be markedly different from juries commonly impanelled today but would be better equipped to deal with our most complex cases."[60]

Experience in applying specialized knowledge is another variable necessary for intelligent decisionmaking. Nordenberg and Luneburg advocated the use of expert nonjury tribunals for "those types of civil controversy where Congress reasonably believes that expertise could improve decisionmaking and thereby contribute to full realization of its substantive legislative goals."[61]

JUROR PERSPECTIVES

Jurors represent excellent sources of information about what is right and wrong with jury duty and how well jurors fulfill their responsibilities to the court and the community. Cramer interviewed more than a thousand jurors following their service on civil or criminal cases. He found jurors more likely to notice ineptitude on the part of counsel than proficiency. They appreciated vigor and thoroughness in cross-examination but disapproved of counsel using slang, jargon or extreme informality.[62] The adage that "you should never ask a question you don't know the answer to" was supported by the Cramer survey. He found jurors saw the appearance of surprise on the part of counsel as a sigificant weakness in the case. Jurors also approved closing arguments that integrated and analyzed evidence as it related to the jury instructions. But jurors criticized closing arguments that were repetitive and irrelevant. They also found statements of ingratiation patronizing. Counsel would also do well to avoid negative comments about opposing counsel or the opponent's case as well as statements stressing the importance of the juror's task or the need for close attention to the presentation. Such remarks were considered unneccessary since jurors expressed keen interest in the cases and found such statements demeaning.[63]

Schott, a television producer, reported that during his service as a juror, he was the only juror who took notes. He also observed that while all the jurors he met were substantially inconvenienced by attending the trial, each expressed conviction that participation provided a valuable public service.[64]

Bridgeman and Marlowe interviewed 65 California jurors from ten felony trials. The jurors they questioned reported that a unanimous vote never occurred on the first ballot. After two ballots, however, 95% of the jurors had reached what would be the ultimate verdict. Unlike the ability of Henry Fonda to persuade his fellow jurors in the classic Twelve Angry Men, the minority was never able to persuade the majority to see things its way. "The posttrial deliberation proceedings then, do not appear to be a significant factor in forming juror opinion or in determining final voting behavior."[65] Jury deliberation, however, serves an important function. Rather than changing opinions the posttrial discussion allows the juror "to confirm the validity of a decision that he or she has already made."[66]

The innovative use of mock trials to aid counsel in case preparation had added significantly to the importance of juror interviews. The impact of this kind of pre-trial research, however, depends in large measure on the procedural constraints of the actual trial. As Ryan and Neeson asserted: "Jurywork analysis is without real effect if voir dire procedures are not expanded so that trial advocates have more latitude to explore juror prejudice and bias."[67]

The jurors' perception of the trial process provides valuable insight into ways legal professionals can design their cases for maximum effect. It is of even greater importance to the case to know how jurors perceive and process the evidence during the trial. As Vinson observed, perception depends on the jurors' physical and psychological states, their ability to adapt to stimuli and the organizational activity required to derive meaning from sensory data.[68]

The ability of jurors to process evidence and testimony has been of special concern to researchers interested in a jury's reaction to expert or eyewitness testimony. Deffenbacher and Loftus concluded that it should not be assumed that jurors are knowledgeable of variables affecting eyewitness behavior.[69] In another study, 83.7% of the prospective jurors over-estimated the accuracy of eyewitness identifications in three similar case situations.[70]

In a case study of two juries that reached opposite verdicts in the same case, Austin reported that the first jury hung at 5-1 in favor of the plaintiff. The second jury voted 6-0 against the plaintiff. He attributed the outcome of the first trial, not to the evidence or its presentation as much as to the demographics of the jury and personality conflicts that precipitated the deadlock.[71] The outcome of the second trial resulted from the different demographic composition of the jury and the jurors' observation of bizarre behavior outside the courtroom by the plaintiff's chief expert witness.[72]

Another innovative application of juror perspectives involves the use of a shadow jury to help plan trial strategy while the trial is in progress. Behavioral scientists, working with I.B.M. attorneys, recruited shadow jurors who were similar to the actual jurors in psychological and demographic make-up to provide their perspectives on the complex issues in a multi-million dollar antitrust suit.[73] Interviews with the shadow jurors led researchers to several enlightening conclusions. Jurors made their decisions early in the case. Subsequent behavior was designed to support the decision. Nonverbal cues and interaction among the jurors allowed individual jurors to ascertain the decisions of the other jurors. Although interaction among fellow jurors is desired, the artificial climate created by the trial precludes discussion of most trial-related topics. Finally, jurors work hard to understand the case's complex issues and most believe they have a good understanding of the majority of the points under dispute.[74] With sentiment in this country increasingly favoring capital punishment, researchers have renewed interest in the juries that deliberate cases where the death penalty is a possible sentence. Henry argued that exclusion of jurors opposed to the death penalty precludes representativeness and predisposes the jury to support the prosecution. He also suggested that extensive formal discussion of the death penalty during voir dire may create an aura of guilt affecting perceptions of the defendant.[75]

Taylor and Buchanan found that persons who favor capital punishment are more inclined to render a guilty verdict based on a given amount of evidence than are those who oppose capital punishment.[76]

CONCLUSION

The foregoing review of recent research in jury selection and behavior provides several notable findings. Considerable research has been conducted into the nature and effectiveness of the jury system. Social scientists have become increasingly interested in jury selection and the resulting relationship between juror characteristics and jury verdicts. The Supreme Court has continued to exercise profound influence on what is and is not permitted during voir dire, the evidentiary portion of the trial and the jury's deliberation. The impact of this influence has been a topic of continued research interest. Jurors have been watched, surveyed and interviewed before, during and after their jury duty. Yet the growing quantity of social scientific data on juries remains largely unnoticed or ignored by the courts. Particularly distressing is the slowness of the legal community's response to the uniformly positive results produced from innovative methods for jury selection and instruction. It is equally disturbing to see that of the more than seventy research citations included in the present review, only four come from communication journals. The profession sponsoring the conference on "Communication Strategies in the Practice of Lawyering" needs to devote more of its publication space to legal communication research. Communication professionals seem almost as insensitive to the importance of legal communication research as are their colleagues in the legal community. If communication researchers are to take their place in the courtroom beside other behavioral scientists working in actual trials, communication literature must reflect the growing body of evidence that presents legal process as communication transactions subject to analysis and evaluation.

Communication in the courtroom, like most other forms of behavior, can be studied, understood and predicted. The two important considerations for researchers interested in studying legal communication are, first, finding opportunities for research and, second, conducting the research in ways that maximize its external validity. Researchers must turn to the legal profession for help in making opportunities for research available. Courtroom doors are opening to social scientists. The quality of our research will determine if those doors remain open. Miller, Fontes, Boster and Sunnafrank offered three suggestions that should improve the generalizability of legal communication research.

> (1) If trial simulations are to provide much practical guidance concerning juror behavior, they should use persons whose demographic characteristics and perceptual and attitudinal sets approximate those of actual venirepersons. (2) If trial simulations are to provide much practical guidance concerning juror behavior, they should be conducted under informational and presentational conditions closely approximating the actual courtroom trial. (3) Trial simulations should be planned so that both individual and group measures are gathered and compared, with the goal of obtaining more information about the relationships between the two data sets.[77]

The study of legal communication again merges two disciplines once closely linked. If communication theory and research are to benefit judges, lawyers and litigants, a dialog must be established between communication scholars and legal professionals. Such an exchange will be advantageous to both groups. The need for the exchange is especially apparent in jury trials with their emphasis on communication between legal professionals and lay citizens.

Pabst, Munsterman and Mount asserted that "the jury system has remained more or less unchanged in a country of great technological change, but it can be made better now by direct action of the courts."[78] The action they recommended included shorter periods of service, elimination of unnecessary paper work and providing realistic information about jury duty to jurors and the community. From a communication perspective, the courts can make great strides toward improving juror effectiveness by being more receptive to legal communication researchers and their findings.

FOOTNOTES

K. Phillip Taylor is Professor of Communication and Executive Director of the Institute for Study of the Trial at the University of Central Florida, Orlando; John W. Wright is Associate Professor, Department of Broadcasting, University of Florida, Gainesville.

[1] Howard S. Erlanger, "Jury Research in America: Its Past and Future," Law and Society Review, 4 (1970), 345-370.

[2] Paul Lermack, Materials on Juries and Jury Research (Chicago: American Judicature Society, 1977).

[3] The majority of the citations included in this review were listed in the Index to Legal Periodicals.

[4] Harry Kelven, Jr. and Hans Zeisel, The American Jury (Boston: Little, Brown and Company, 1966).

[5] Gordon Bermant, Charlan Nemeth and Neil Vidmar (Eds.), Psychology and the Law (Lexington, Mass: D. C. Heath and Company, 1976).

[6] See: Charlan Nemeth, "Rules Governing Jury Deliberations: A Consideration of Recent Changes," Psychology and the Law, pp. 169-184; Larry C. Farmer et al. "Juror Perceptions of Trial Testimony as a Function of the Method of Presentation," Psychology and the Law, pp. 265-282; Richard A. Berk, "Social Science and Jury Selection: A Case Study of A Civil Suit," Psychology and the Law, pp. 283-297.

[7] Rita J. Simon, The Jury and the Defense of Insanity (Boston: Little Brown, 1967); Rita J. Simon (ed.), The Jury in America (Beverly Hills, California: Sage Publications, 1975); Rita J. Simon, The Jury: Its Role in American Society (Lexington, Mass: D. C. Heath and Company, 1980).

[8] See: Margorie S. Schultz, "The Jury, Redefined: A Review of Burger Court Decisions," Law and Contemporary Problems, 43 (Autumn, 1980), 8-23; Robert G. Jonston, "Jury Subordination Through Judicial Control," LACP, 24-50; Alan Scheflin and Jon Van Dyke, 51-115, "Jury Nullification: The Contours of a Controversy"; Herald P. Fahuinger, "In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case," 116-136; "The Jury System in Death Penalty Cases: A Symbolic Gesture," Courtney Mullin, 137-154; Joseph M. Hassett, "A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Info and "Prejudicial Publicity," 155-168.

[9] Margorie S. Schultz, "The Jury Redefined: A Review of Burger Court Decisions," Law and Contemporary Problems, 43 (Autumn, 1980), p. 8.

[10] John Burgess, "The American Jury," Trial, 17 (April 1981), 6.

[11] Peter W. Sperlich, "The Case for Preserving Trial by Jury in Complex Civil Litigation," Judicature, 65 (March-April 1982), 397.

[12] Sperlich, 396.

[13] Rita J. Simon, The Jury: Its Role in American Society, p. 41.

[14] David Suggs and Bruce Dennis Sales, "The Art and Science of Conducting the Voir Dire," Professional Psychology, 9 (August 1978), 383.

[15] Suggs and Sales, 376.

[16] David L. Suggs and Bruce Dennis Sales, "Juror Self-Disclosure During Voir Dire: A Social Science Analysis," Indiana Law Journal, 56 (1981), 245-271.

[17] D. Suggs and B. D. Sales, "Using Communication Cues to Evaluate Prospective Jurors During Voir Dire," Arizona Law Review, 20 (1978), 629-642.

[18] Contrast David Silver, "The Case Against the Use of Public Opinion Polls as an Aid in Jury Selection," Journal of Computers and Law, 6 (1978), 177-195, with William Martin, An Interview with Richard 'Racehorse" Haynes," Trial, 14 (April 1978), p. 27.

[19] For an excellent discussion of representative jury selection see Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels (Cambridge, Mass.: Ballinger Publishing Company, 1977).

[20] Herald P. Fahringer, "In the Valley of the Blind: A Preview of Jury Selection in a Criminal Case," Law and Contemporary Problems, 43 (Autumn, 1980), 177.

[21] Terry Mackey, "Jury Selection: Developing the Third Eye," Trial, 16 (October 1980), 23.

[22] Richard Faust and Josephine Carlson, The Impact of Age and Other Stratification Variables on Attitudes Toward Justice (Brooklyn, New York: Center for Responsive Psychology, 1977), p. 16.

[23] Carol J. Mills and Wayne Bohannon, "Juror Characteristics: To What Extent Are They Related to Jury Verdicts?" Judicature, 64 (June-July, 1980), p. 30.

[24] Gary Moran and John C. Comfort, "Scientific Juror Selection: Sex as a Moderator of Demographic and Personality Predictors of Impaneled Felony Juror Behavior," Journal of Personality and Social Psychology, 43 (1982), 1061.

[25] John R. Hepburn, "The Objective Reality of Evidence and the Utility of September Jury Selection," Law and Human Behavior, 4 (1980), 98.

[26] J. J. Brosnahan, "First Amendment Jury Trials," Litigation, 6 (1980), 28-30.

[27] E. Hawrich and E. Tate, "Determinants of Jury Selection," Saskatchewan Law Review, 39 (1975), 285-292.

[28] J. B. McConahay, "Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little," Law and Contemporary Problems, 41 (1977), 205-229.

[29] Lori B. Andrews, "Mind Control in the Courtroom," Psychology Today, 16 (March 1982), pp. 70-73.

[30] R. W. Shell, "Scientific Jury Selection: Does It Work?" Barrister, 7 (1980), 47-49, 52-54.

[31] Alice M. Padawer-Singer, Andrew N. Singer and Rickie L. J. Singer, "Legal and Social - Psychological Research in the Effects of Pre-Trial Publicity on Juries, Numerical Makeup of Juries, Non-Unanimous Verdict Requirements," Law and Psychology Review, 3 (1977), 71-79.

[32] Stuart Nagel, "Bringing the Values of Jurors in Line with the Law," Judicature, 43 (1979), 189-195.

[33] Raymond W. Buchanan, Burt Pryor, K. Phillip Taylor, and David U. Strawn, "Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions," Communication Quarterly, 26 (Fall 1978), 31-35.

[34] E. Constantini, "Partial Juror: Correlates and Causes of Prejudgment," Law and Society Review, 15 (1980-81), 9-40.

[35] Robert M. Bray and Audrey M. Noble, "Authoritarianism and Decisions of Mock Juries: Evidence of Jury Bias and Group Polarization," Journal of Personality and Social Psychology, 36 (1978), 1424-1430.

[36] Ben Jorasky, "Jury Study," Trial Diplomacy Journal, 4 (1982), 4.

[37] Leo J. Flynn, "Does Justice Fail When the Jury is Deadlocked?" Judicature, 61 (September 1977), 133.

[38] Williams vs. Florida 399 U.S. 78, 86 (1970).

[39] P. W. Sperlich, "And Then There Were Six: The Decline of the American Jury," Judicature, LXIII (1980), 262-279.

[40] Ibid., pp. 263-270.

[41] E. N. Beiser and Rene Varrin, "Six-member Juries in the Federal Courts," Judicature, LVIII (1975), 424-433.

[42] Bernard Grofman, "The Slippery Slope," Law and Policy Quarterly, 2 (July, 1980), 301.

[43] Hans Zeisel, "The Verdict of Five out of Six Civil Jurors: Constitutional Problems," American Bar Foundation Research Journal, I (1982), 141-154.

[44] Zeisel, 143.

[45] Minnesota Law Review, 64 (April, 1980), 814.

[46] Robert G. Johnston, "Jury Subornation Through Judicial Control," Law and Contemporary Problems, 43 (Autumn, 1980), 24-50.

[47] Alan Scheflin and Jon Van Dyke, "Jury Nullification: The Contours of a Controversy," Law and Contemporary Problems, 43 (Autumn, 1980), 24-50.

[48] B. L. Becker, "Jury Nullification: Can a Jury Be Trusted?" Trial 16 (October, 1980), 45.

[49] Becker, 45.

[50] Don W. Brown, "Eliminating Exemptions from Jury Duty: What Impact Will It Have?" Judicature, 62 (April 79), 448.

[51] Robert G. Nieland, Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System (Chicago: American Judicature Society, 1979).

[52] William W. Schwarzer, "Communicating with Jurors: Problems and Remedies," California Law Review, 49 (1981), 731-769.

[53] Laurence J. Severance and Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions," Law and Society Review, 17 (1982), 153-197.

[54] Bert Pryor, K. Phillip Taylor, Raymond W. Buchanan and David U. Strawn, "An Affective-Cognitive Consistency Explanation for Comprehension of Standard Jury Instructions," Communication Monographs, 47 (March, 1980), 74.

[55] K. Phillip Taylor, Raymond W. Buchanan, Bert Pryor and David U. Strawn, Journal of Communication, 31 (Spring, 1981), 39. Also see: David U. Strawn, Raymond W. Buchanan, Bert Pryor and K. Phillip Taylor, "Reaching a Verdict, Step by Step," Judicature, 60 (March, 1977), 383-389; K. Phillip Taylor, Raymond W. Buchanan, Bert Pryor and David U. Strawn, "Avoiding the Legal Tower of Babel," The Judges' Journal, 19 (Summer 1980), 10-15, 50-51.

[56] 65 (March-April 1982).

[57] David U. Strawn and G. Thomas Munsterman, "Helping Juries Handle Complex Cases," Judicature, 65 (March-April 1982), 445.

[58] Strawn and Munsterman, 446.

[59] Amiram Elwork, James J. Alfini and Bruce D. Sales, "Toward Understandable Jury Instructions," Judicature, 65 (March-April 1982), 442.

[60] Mark A. Nordenberg and William V. Luneburg, "Decisionmaking in Complex Federal Cases: Two Alternatives to the Traditional Jury," Judicature, 65 (March-April 1982), 426.

[61] Nordenberg and Luneburg, 430.

[62] M. Michael Cramer, "Trial Balloon: A view from the Jury Box," Litigation, 6 (Fall 1979), 3-4.

[63] Cramer, 4-5.

[64] Richard Schott, "Trial by Jury: Reflections of a Juror," Trial 13 (May 1977), 56-59.

[65] Diane L. Bridgeman and David Marlowe, "Jury Decision Making: An Empirical Study Based on Actual Felony Trials," Journal of Applied Psychology, 64 (April 1979), 94.

[66] Bridgeman and Marlowe, 95.

[67] Daniel J. Ryan and Peter J. Nesson, "Voir Dire: A Trial Technique in Transition," American Journal of Trial Advocacy, 4 (1981), 544.

[68] Donald E. Vinson, "Juries: Perception and the Decision-Making Process," Trial, 18 (March 1982), 52-55, 81.

[69] Kenneth A. Deffenbacher and Elizabeth F. Loftus, "Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?" Law and Human Behavior, 6 (1982), 15.

[70] John C. Brigham and Robert K. Bothwell, "The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications," *Law and Human Behavior*, 7 (1983), 19-30.

[71] Arthur D. Austin, "Jury Perceptions on Advocacy: A Case Study," *Litigation*, 8 (Summer 1982), 15.

[72] Austin, 68.

[73] Donald E. Vinson, "The Shadow Jury: An Experiment in Litigation Sciences," *American Bar Association Journal*, 67 (1982), 1242-1246.

[74] Vinson, 1244-1246.

[75] Craig Haney, "Juries and the Death Penalty: Readdressing the Witherspoon Question," *Crime and Delinquency*, 26 (October 1980), 512-527.

[76] K. Phillip Taylor and Raymond W. Buchanan, "The Effect of Attitude toward Capitol Punishment on the Evaluation of Evidence and the Determination of Guilt," paper presented at the convention of the Speech Communication Association, November 1982, Louisville, Kentucky.

[77] Gerald R. Miller, Norman E. Fontes, Franklin J. Boster and Michael J. Sunnafrank, "Methodological Issues in Legal Communication Research: What Can Trial Simulations Tell Us?" *Communication Monographs*, 50 (March, 1983), 38; 42; 45.

[78] William R. Pabst, Jr., G. Thomas Munsterman and Chester H. Mount, "The Value of Jury Duty: Serving is Believing," *Judicature*, 61 (June-July, 1977), 42.

FROM THE LEGAL PROFESSION: LEGAL STRATEGIES AND RESEARCH NEEDS IN THE SELECTION OF JURIES

Robert J. Feldhake, Esq.

> "Mice run through a maze in a learned process, believing that the reward at the end of the labyrinth will be a scrumptious piece of cheese. Not unlike the rodent, trial lawyers pursue voir dire in a time honored manner, set up by tradition and law, all in the hopes that they will obtain 12 jurors who will render a verdict consistent with their client's position."

The ability to arbitrarily dismiss criticism, whether a natural talent or an acquired skill, is hardly limited to the legal profession. Yet attorneys consistently profess the importance of jury selection while acknowledging an approach to the process ill befitting such a critical stage in civil and criminal litigation. That the approach of practitioners may be characterized by a trial court judge as analogous to the fancies of a hopeful but trapped rodent offers sufficient testimony as to the necessity for a systematic analysis of the entire selection process.

In addressing "legal strategies and research needs in the selection of juries" from the perspective of a practicing attorney, my preparation entailed a review of the literature from 1960 to date on the subject of "jury selection." This review looked to materials and indices generally consulted by attorneys in case and trial preparation. To the extent under-inclusive, my "literature review" may furnish a suitable "need" of practitioners in having ready assess to available information. Preparation also involved a reconsideration of my personal approach to voir dire and preparation for jury trial as well as the approaches of my colleagues as observed in trial settings. While not familiar with the available indices, I also attempted to consider research undertaken in the "communications field" on the broad topic of jury analysis.

As one attorney asked to address "legal strategies and research needs in the selection of juries," it is important to appreciate the context of my comments. My law practice is a hybrid of general corporate/personal representation and civil litigation, with the latter primarily involving non-personal injury matters. Jury trials then have been and will continue to be few and far between. However, I profess a personal belief that a client's fortunes are jeopardized whenever subjected to the "decision making process" of six or twelve relatively unknown individuals who suddenly find themselves cloistered together and charged with resolving a dispute about which more knowledgeable and involved parties have disagreed for years.

Nevertheless, I appreciate the importance of the selection process, though perceive an understanding of the "probable jury" to be of great worth at every phase of client representation. What "legal strategies and research needs" are important to the legal profession, however, will vary from attorney to attorney depending on the nature of his or her practice. For example, strategies and research needs of interest to an attorney specializing in complex antitrust litigation may not be shared by an overburdened and resource starved public defender. Thus, consideration of certain of my comments should always be in light of the nature of my practice as it is quite probable that a criminal attorney, personal injury specialist or government counsel would offer substantially different strategies and research needs.

Several approaches were possible in the preparation of this paper. One format would certainly be to conduct a general survey of the available research and point to gaps in the subject areas considered or deficiencies in particular completed analyses. An alternative suggestion offered by several mentors constituted a step-by-step discussion of the actual selection process with the submittal of proposed research areas at each and every stage of the process. Both approaches, I submit, share the general deficiency in the state of jury selection research: the lack of an integrated, working approach for the practitioner to employ from the very onset of litigation.

I have elected to merge a general overview of the jury selection process with both a recommended overall research and strategies approach to jury selection as well as a discussion of specific, current areas of interest where targeted research would be of great and immediate value. As a starting point, I have attempted to furnish a generalized summary of the procedural aspects of the jury selection process. My discussions with several persons in the communications field left me with the impression that while there is an understanding of certain primary aspects of jury selection, there is a lack of appreciation as to the overall importance of jury analyses as well as a lack of familiarity with the practical aspects of the actual selection process. I hope to offer sufficient comment to furnish a basis for the consideration of research needs in very specific, limited jury and case situations.

The general overview of the jury selection process lends itself to a consideration of the importance of jury selection studies to the practitioner. In this regard I again have a personal opinion, not necessarily shared by most attorneys, which shapes my perception of the more functional research areas and the desirability of a process oriented approach. There exists, in my opinion, inestimable value to having an integrated process to evaluate the potential jury pool at the inception of litigation, even though actual trial dates may be two to five years in the future. To have ready access to such information permits more accurate case evaluations, attorney-client counsel, properly oriented pretrial discovery and adversarial negotiations.

Following a commentary on the overall importance of the potential jury pool, I have attempted to identify the actual approaches adhered to by practitioners in the selection of a jury. Attention is given to the "experience" based approach in contrast with the "systematic process," and recognized constraints on the benefits of each are noted. With the identification of such general approaches and suggested research considerations in each, further specific areas of recommended study are addressed with the importance of these recommended areas classified with respect to recent developments in the procedural aspects of jury selection.

Two somewhat lengthy attachments are offered with this paper: (a) proposed voir dire questions, representing commonly relied upon inquiries in the jury selection process; and (b) a compendium of resource materials on the subject of jury selection as gleaned from a review of the Index to Legal Periodicals[2], the Readers' Guide to Periodical Literature[3], the Current Index to Legal Periodicals[4], as well as from personal and office research files and bibliographies. While the former is appended to this paper, the compendium independently exceeded forty pages in length and could not be published in the journal of proceedings. A copy will be furnished on request.

The compendium of resource materials is substructured so as to provide a working document on the subject of jury selection. To serve such a purpose, I sought to trace literature on this subject from January of 1961 through late May of 1983. Functional utility is served by categorizing materials within such areas as "general commentaries on the jury system," "procedural aspects of jury selection," "specific case areas and jury selection," "qualification factors in jury selection," "approaches to jury selection" and "special issues in jury selection." Further, more detailed substructuring is provided to facilitate ease of reference.

In light of the considerable expanse devoted to a summarization of literature on the topic of jury selection, my immediate comments focus on the perceived needs of a practitioner in lieu of a presentation of "where we have been" in the study of jury selection tactics. Citation of sources will be kept to a minimum as extensive identification of commentaries on subtopics would unnecessarily duplicate efforts undertaken in producing a functional compendium of such literature. There are questions which need to be addressed in respect of such literature, and it is to such questions that this paper is directed.

One further prefatory comment is required as to the appended "proposed voir dire questions." I offer the attachment as an indicator of those questions asked by attorneys of prospective jurors in most cases. Certainly one approach to this paper would be to offer the attachment and ask for the assistance of the communications field. I am not sure that such an approach would be of much value to the reader or of publishable worth. However, even as this paper approached completion, I was unsure but that the best approach has not been overlooked.

THE JURY SELECTION PROCESS: A BRIEF PROCEDURAL OVERVIEW

The peculiar assigned province of the contemporary jury is the determination of questions of fact arising during the course of trial proceedings.[5] Questions of law are reserved for determination by the court. In both the civil and criminal litigation, the option to have factual controversies adjudicated by a jury of one's peers remains a fundamental right and a favored aspect of jurisprudence.[6] Credos as to the vitality of the jury process are literally without bounds[7], though there is an implicit recognition that the frailties of the jury system are such that justice is not impossible in the absence of a jury.[8]

Jury trial rights are made available through the Seventh Amendment to the United States Constitution, securing the right to a jury trial in all actions at common law in the federal courts where the matter in controversy exceeds the sum of twenty dollars.[9] This right has been extended to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment.[10] State constitutions generally extend express guaranties of the right to a jury trial in civil and criminal matters.[11]

With the right and the importance of the jury trial right well established, the maximum practical benefit of a jury trial hinges on the capability of the system to generate a jury pool from which unbiased, impartial jurors are selected to determine a particular factual controversy. Several brief comments are in order as to the procedures by which the jury pool is generated.

The Jury Selection and Service Act of 1968[12] governs the selection process for juries in the federal courts. Each state, whether by constitutional or statutory provision, independently has jurisdictional authority over the process for compiling the jury pool.[13] While divergencies exist in the voir dire aspects of jury selection, the federal and state systems share common aspects as to the process of compiling lists of potential jurors.

Principal reliance is placed on the use of voter registration lists for the random selection of jurors within the judicial district or jurisdiction of the presiding court.[14] Names are randomly selected from the lists and, if selected, a person is called to jury duty subject to certain exemptions which vary from state to state and on the federal level.[15] A pool is created for a designated time period and each person within that pool may be called before a court for a still further selection process. This second "selection" looks to whether a prospective juror in the pool will actually participate as a jury member in determining a matter in litigation.

The system for compiling jury pools from voter registration lists and the exacting scrutiny with which the process is administered represents efforts to achieve panels of jurors constituting a cross section of the community in which the crime occurred or in which the civil matter is to be adjudicated.[16] Individual participation in the process is perceived as part and parcel of a program of citizenry adjudication of fact issues, the process being designed to assure a citizen that only his or her peers will be empowered (should he/she so elect to exercise a jury trial right) to resolve critical factual questions.[17] As a direct consequence of the importance of the jury pool, the entire selection process is constantly under review and challenge.[18]

Once the possible venire or jury pool has been created, individual jurors are summoned in groups for questioning by either the judge or the attorneys for the parties to determine the acceptability for the adjudication of particular controversies. This phase is commonly referred to as the "voir dire," and is characterized by trial counsel as one of the most critical phases of any judicial proceeding.

There is a divergence of procedures for voir dire as between the federal and state court systems. In the federal system, the trial judge generally conducts all questioning of the jurors. Individual attorneys may petition the court to supplement the questions or to permit some attorney questioning, subject to the discretion of the trial judge.[19] State practices vary widely through it is far more common to find significant attorney questioning of potential jurors in the state court system than in the federal system.[20] In either case, attorneys have significant imput into the questioning, either through actual involvement in direct voir dire or through submittal of proposed questions to the trial judge.

The venacular of jury selection quite often references an attorney's "challenging" a juror. "Challenges" to potential jurors may consist of challenges to the array, challenges for cause or peremptory challenges. An attorney may seek to challenge the entire jury pool source or the array based on possible prejudice, e.g., racial, prejudicial pretrial publicity, etc.[21] Successful challenges to the array are rarely successful except in the most sensational of crimes or exceptional of civil matters.

"Challenges for cause," on the other hand, seek judicial acknowledgement that a potential juror has a bias against a party or an interest in the outcome of the litigation that is established through voir dire questions disclosing a basis for challenge.[22] A "peremptory challenge," in contrast, is a challenge made to a potential juror as a matter of right.[23] There need be no cause of justifiable reason for the challenge. While limitations have been recognized on the attorney's exercise of peremptory challenges to systematically exclude classes from jury service, peremptory challenges are generally subject to few constraints.[24]

Once both sides have agreed to a panel of six or twelve jurors, depending on the nature of the case and the election of the parties, and following the possible selection of alternate jurors, the body is impaneled, sworn and initial instructions may be given. The selection process is essentially concluded at this point.

THE IMPORTANCE OF JURY SELECTION STUDIES: AN OVERVIEW AS TO IMPORTANCE WELL PRIOR TO TRIAL

There is a prevalent conception of "jury studies" having value only within minutes of being assigned to a courtroom for trial. Even in the exceptional, well publicized cases, studies of the potential jurors and of the probable jury reaction to positions on case issues are generally undertaken only as the trial date approaches. Delays in reaching trial of several years in the federal system and of five to six years in the state court systems (primarily in the concentrated urban areas) tend to place an appreciation of the "probable jury" as an extremely low priority during initial suit negotiations, discovery and pre-trial preparation. Where so few cases actually reach trial, the impetus to comprehensive jury analysis in any one matter is certainly minimal.

Recent information tends to contradict the propriety of assigning jury selection a low priority in case preparation. Studies and commentaries suggest that evaluations can be undertaken of the probable juror mix in the trial locale.[25] Highly reliable conclusions can then be drawn as to the probable jury response to strategies and issue positions to be advanced at trial. Certainly the MCI litigation against ITT stands as an illustration of approaches being drastically altered prior to trial based on jury studies. If it is correct that appreciation of the jury response is so critical prior to trial, and indeed can and should shape issue positions and the presentation of evidence, then is it not also correct that there is major worth to understanding the jury mix and issue responsiveness tendencies at the very moment an attorney is asked to initially evaluate a client's case?

All attorneys, on being initially consulted by a client, are requested to make major substantive evaluations. Requested evaluations range from the probability of success or failure at the time of trial to the possible monetary judgment or sentence which may be imposed. Estimates of defense costs and attorney's fees through the time of trial are often requested. An overriding concern of most clients, regardless of whether the matter is of criminal or civil jurisdiction, is whether the jury will believe their "side of the story." Each and every practitioner is daily asked to render such opinions at the preliminary stages of litigation, years prior to actual trial.

Appreciation of the probable jury composition and an awareness of the issue response tendencies of the "typical juror" in the vicinage seem of inestimable value in offering such evaluations. The moment a lawsuit is filed, an understanding of the probable jury facilitates every aspect of client representation. To have access to data on the probable jury responsiveness on issues, data gathered from the community where the jury pool is generated, reduces the speculative nature of early recommendations. We underestimate the value of jury studies by prioritizing them highly only on the eve of trial.

Several examples serve to illustrate the importance of such studies well prior to trial. When a client contacts an attorney and requests an evaluation of a suit against a local manufacturer, one major component of any such evaluation is the prior litigation experience of that manufacturer in the jurisdiction. Aiding an evaluation would be information on the community's predisposition towards (a) suits involving nonresidents, nonresidents and residents, and individuals against a corporate entity; (b) economic issues such as the impact of testimony as to corporate wealth, perception of business persons as assuming major risks in entering into certain ventures, and antagonism towards "commercial disputes" over money; and (c) voting patterns based on the importance of the corporate manufacturer to the economic vitality/survival of the area. If these factors are determinative at the time of trial, they are no less important at the preliminary stages of litigation in the rendition of advice to clients, evaluation of discovery filings and overall approach to the prosecution/defense of the litigation.

Negotiations between counsel for opposing parties furnishes another instance where jury selection studies are of great worth. It is quite common for counsel to meet and confer well prior to trial to ascertain whether an amicable resolution of the litigation is possible. Such conferences may and often do occur prior to either party filing a lawsuit. For one party to be able to address issues during the course of such negotiations in terms of the probable jury which will hear the dispute can be highly persuasive. Where one party is able to approach disputed issues and authoritatively show that regardless of the merits of the dispute the typical juror profile in the locale would reject the adversary's position, an incredible negotiating advantage has been obtained. This is particularly true where only one party to the negotiations is prepared to discuss data on the probable jury composition and response tendencies.

Of course, the worth of advance jury selection studies is not restricted to the rendition of better services to the client. The same attorney who is requested to make detailed substantive evaluations to the prospective client of probable success or failure in a lawsuit is also called upon to decide whether to accept or reject the case. If the attorney decides to accept the case, the terms of the attorney-client contract must be negotiated. To appreciate the probable jury pool, typical juror profile and issue predisposition in the community would seem important to evaluating whether to accept the client's case and in opting to accept representation on a contingency fee basis as opposed to hourly charges for services rendered.

What then can communication theorists offer to the legal profession concerning jury selection? If one accepts the position that a sound appreciation for the probable jury pool and the pattern tendencies of jury responses to certain types of cases, types of arguments, characteristics of clients and standardized factors in litigation is of value throughout the course of litigation, then a great wealth of information can be offered. Attorneys receiving case assignments would be assisted through studies of the jurors in the area, general analyses of case acceptance amongst certain occupational and socio-economic groups and identification of standard variables which can be considered at the very early stages of litigation.

Were there to exist such comprehensive compilations of jury pool data unrelated to particular cases, I suggest they would be consulted by attorneys on a frequent basis. We are aware, for example, of the successful pretrial studies in the M.C.I. litigation as well as in the Boudin and the Harrisburg proceedings. But for a typical practitioner the prime offering from communication strategists would be a compilation as to the acceptability of certain approaches to the probable jury which will be drawn from a particular district or county [or general population divisions to the extent lines can be drawn]. Such analyses, should they in fact be feasible, could be resorted to at every stage of a lawsuit and be of controlling worth well before the first juror is subjected to voir dire.

Once past the pretrial stage, there is little disagreement in the legal profession as to the substantial advantages of having access to such data.[26] Whether the information is used for a mock trial or strategy session, having information as to the type of jury desired and the best approach to that jury at the very commencement of voir dire is invaluable. The type of juror desired, how to ferret out biased jurors during voir dire, the nonverbal symbols and how to identify them, the manner of questioning during voir dire, the nonverbal displayed by the attorneys during first confrontations with the jurors and its impact -- all constitute sources of information which attorneys seeking ever better preparation would consider.

COMPARISON OF APPROACHES TO THE SELECTION OF A JURY

The compendium of research materials suggests the existence of multiple approaches to jury selection.[27] However, the common tactics of trial lawyers consist of either "experience" oriented voir dire jury selection or "systematic" (a/k/a "scientific") selection efforts. There does not appear to be a middle ground where the best of the approaches are merged.[28] The literature strongly suggests, and personal experience tends to verify that an attorney exposed to certain data on psychological and social science imputs to selection strategies will fall back on "instinct" and "personal knowledge" where that systematic approach is not complete as a comprehensive, functioning jury selection model.

There is a recognition that most new attorneys are poorly educated as to the proper methodology (much less the existence of alternative approaches) for jury selection. There is in fact general acknowledgement that most new trial attorneys lack an appreciation for the selection process, whether due to the unavailability of information or due to instructed reliance on form voir dire questions and the guidance of "more experienced" trial attorneys. As these attorneys try cases and gather experience, and as their work schedules expand to leave very little "reading time," the tendency to rely on past experience and to appreciate but not implement new systematic approaches to jury selection is quite clear.

Ronald Rolfe, a partner at Cravath, Swain & Moore, has suggested that "a lot of jury cases" furnishes a trial attorney with "experience picking jurors that is far more valuable than [an attorney] can gain through jury research."[29] F. Lee Baily, a prominent trial attorney with recognized expertise in handling juries, notes that while demographic data may offer useful generalities, "[t]he best jury picker of all would be like the Ancient Mariner -- he'd fix them with his glittering eye and capture them."[30] For one without prior extensive jury trial experience or the talents of the Ancient Mariner, such instruction does little to assist a trial attorney in selecting the best possible jury for the immediate litigation.

In contrast with the "experienced" or "instinctive" approach is systematic or scientific jury analysis.[31] Such a process offers an analytical technique designed to provide a framework, a model of that jury best suited to hear a particular case from the perspective of one of the adversaries. "Systematic jury selection" is in fact a broad classification of an evolving process. Commitment to such an approach requires significant pretrial investigation of the possible jury mix, predispositions of the probable jury pool, analysis of evidentiary issues and jury reaction to presentations and objections, and even mock trials, shadow juries and revisions in trial strategies.

Perhaps it may best be said that the ultimate consequence of such a systematic approach, whether based in social theory, psychology or communications research, is that the case is constructed to fit the probable jury. The "experienced" or contemporary approach is to select the best jury possible and trying to convince them of the merits of the case. To distinquish, the former looks to at the selection of the jury as a controlling factor to be considered in tandem with case preparation. The latter approach has a goal of keeping totally biased persons off the jury and placing reliance on experienced trial counsel to mold whatever is left.

Unfortunately, I do not consider there to be a viable "middle ground" between these positions. Practitioners tend to either rely on experience and instinct, or where a case of sufficient complexity and potential recovery presents itself effort is undertaken to research possible jury compositions and to construct litigation positions. There is no readily ascertainable level of "some instinct plus some research," for it would appear likely that instinctive jury selection or traditional patterns of "experienced" jury selection offsets the impact of partial selection based on jury study and analysis. Little is gained where six jurors are selected on a studied basis and six others chosen through the eyes of the Ancient Mariner as the juror composite would remain a mystery..

FROM THE LEGAL PROFESSION: SPECIFICS ON RESEARCH AND STRATEGY NEEDS

Classification of research and strategy needs in the approach to jury selection is a two step process. Initially, an "overall position" needs to be set forth as to what a practicing trial attorney requires of a communications model or systematic approach for reliance to be placed on such a model or approach during jury selection. Only after an overall position is attained can specific problem areas then be identified and targeted research proposed.

Of primary importance to trial attorneys is the creation of a functional, comprehensive approach to jury selection where variables are not only identified but interrelated as part of a working, systematic approach to jury selection. A review of literature concerning studies on jury selection discloses a rather haphazard approach to the entire process. We have a wealth of data from the communications field on the tendencies of college sophomores in educational environs but little on the "typical juror" in an austere courtroom. There is considerable information available on a multitude of subtopics, but that information is so subtopic specific as to suffer a lack of appreciation by the legal profession as to its functional value.

Studies of dogmatism, for example, are certainly probative as to a dogmatic individual's tendency to accept or reject certain types of parties, witnesses and arguments. To be able to recognize and account for dogmatic traits during the voir dire would seem of obvious worth to the trial practitioner. Similarly, there is no real dispute as to the importance of identifying and accounting for individual juror "constructs" as disclosed during the voir dire. Any effort on the part of the communications profession to enhance the legal community's appreciation of nonverbal communication/signals from potential jurors seems of inherent worth.

What is clearly absent, however, is a systematic approach to the creation of a functional communications model or scientific process to jury selection. Practitioners are faced with an endless array of "pocket research," detailed analyses of specific factors without regard to interaction with other factors appropriate for consideration in the selection of a jury. Even more common is an attempt to rationalize communications research on one variable as determined through college student volunteers across fields and into the atypical environment of a courtroom where the average juror rarely has characteristics shared by university students.

For example, consider the case of an experienced trial attorney who wishes to abandon the eye of the Ancient Mariner in favor of a "scientific approach." In either conducting the voir dire or in listening to prospective jurors answers to questions from the bench, the attorney perceives that one individual is clearly a highly dogmatic person. Six authoritative studies from the communications field have caused the attorney to recognize the traits, to classify the potential juror as a "high dog" and to appreciate the implications of having such a person as one of the twelve jurors. Unfortunately, the attorney has also received from the same person a contradictory nonverbal response, no individual constructs are apparent and the potential juror has openly laughed at the government's counsel during introductions. The "unfortunate aspect" is that the practitioner has absolutely no functional model from the communications profession to prioritize these factors, to evaluate the interrelationships and to come to a studied conclusion.

The manifest need then is to furnish the attorney with a structured, practical approach to scientific jury selection. In creating such an approach, communicators need to recognize that the audience is not a "student of the jury" but a trial attorney who typically places presumption with experience and instinct because it is a reliance understood from beginning to end. For a systematic approach to be pursued, a practitioner must perceive the alternative selection scheme as a workable system which can be reduced to a practical jury selection approach. The practitioner cannot be asked to accept and implement certain information without being advised as to the "next step," without an ordering of verbal and nonverbal responses, personality characteristics and case scenarios.

There is a considerable quantity of valuable research on jury selection techniques and communication theorists have a wealth of information to offer legal practitioners. However, the organized format for that information will be dispositive of its acceptance by practicing attorneys. All cases are not worth hundreds of millions of dollars and every criminal case does not involve a sensational offense where capital punishment may be imposed. The vast majority of clients cannot face the expenditure of thousands of dollars for an individualized jury selection analysis. Communication experts, alone or in combination with other fields, should attempt to create a workable format, a general approach to jury selection that an attorney on any case can implement. Certainly studies of the general jury dispositions in the vicinity would be helpful and augment the format, but a viable alternative approach must offer a fully workable scheme for the entire selection process.

The "experienced approach" to the selection of a jury lends itself to standardized voir dire questions. Such standardized inquiries, whether utilized by attorneys or submitted to the court on motion, are readily adaptable to any case. Most practitioners will tend to rely on such standardized voir dire questions as "time tested" and offering little risk in usage. Any risk in selecting a jury based primarily on response to form inquiries will be offset, it is hoped and assumed, by the skills of the advocate. A set of standard voir dire questions is appended for review and consideration in light of communications proposal and scientific approaches to jury selection.

Standardized voir dire questions place the "experienced approach" of the trial practitioner in a proper perspective. Trial attorneys select juries with the aim to eliminate biased and totally predisposed individuals from the panel. The goal is not to creat a "good jury" for the client in as much as it is to avoid a "bad jury" which will not accept or listen to the advocate. The scientific or systematic approach of jury study seeks to create a model jury prior to the actual selection process. The advocate then seeks to construct a panel along the lines of the model and to implement strategies prepared on the basis of an assumed jury composition and typical juror profile. In substance, only the latter approach seeks to actively employ the selection process as an opportunity to advance the probability of success at trial.

There are certain specific subjects of current interest in the jury selection process which offer fertile areas for communications research. In reviewing these suggested areas, the reader is cautioned not to consider these proposals as starting points for exhaustive research and anlysis. The prime need of practitioners is the formation of a scientific/communications model which serves as a functional tool in jury selection. Exploration of suggested research areas must follow the creation of such a model, assuming one to be feasible. Otherwise the present situation of haphazard subtopical research will be exascerbated, not improved.

One area of particularly current interest concerns the question of juror privacy and the advocate's position that indepth background investigation of potential jurors is necessary for voir dire preparation. Complicated and/or sensational cases often find attorneys requesting the names, addresses and other available information about potential jurors several weeks prior to trial. Concerns have been raised by the courts as to the degree of intrusiveness which may be involved in extensive background investigation.[32] Judicial precedent on the question of juror privacy appears in conflict as Lehman v. San Francisco, 80 Cal.App.3d 309 (1978) rejected a juror's claim that such investigation invaded his legitimate privacy interests, whereas United States v. Barnes, 604 F.2d 121 (2d Cir. 1979) upheld a lower federal trial court decision barring release of the names and addresses of potential jurors due to concern for their safety in a serious drug trafficking case.

Communications theorists can be of great assistance in resolving this conflict. Attorneys and judicial authorities are concerned as to the extent of voir dire inquiry and background investigation of potential jurors necessary for general trial preparation and for establishing grounds for challenging potential jurors. Whether the attorney is making the choice or the trial court entertaining a motion to restrict investigation of potential jurors, sound data is necessary as to the importance or lack of importance of information obtainable through background investigation. Is there a demonstrable need for information from a potential juror's employer as to work experience, prior accidents and union involvement? How important are prior voting activities, business and social affiliations? Assuming substantive worth to this information, can such data be as accurately determined during voir dire or general juror information cards furnished by the clerks to the attorneys? Having access to this quality of information would provide a compelling argument to the court in support of early release of juror names or for the acceptance of proferred voir dire questions.

Of recent concern is the capability of the average jury to determine factual issues in complicated, protracted litigation.[33] Complex criminal and civil litigation may extend for several weeks to a month or more of actual trial time. Juries in such cases are asked to resolve disputed issues merging unsettled areas of economics, international and national laws and customs, personality and behavioral evaluations, language and sovereignty constraints.

Trial practicioners involved in such complicated and protracted matters are finding the decision to file a jury request a difficult one. Attorneys are faced with the question of a typical jury's ability to both remain attentive and to comprehend central aspects of a lengthy trial. Where an election is made to file a request for a jury trial, attorneys are finding their requests challenged on motion by an adversary on the ground that the case is "too complex" for a jury even with reliance on expert testimony.

For example, antitrust litigation offers the prospect of a lengthy trial with extensive testimony on complicated issues of geographic and product markets, acquired market power of the defendant, the legitimacy of the defendant's economic (e.g., distribution, advertising, pricing and retail schemes) activities in the relevant markets, the capacity of the market to withstand multiple entrants and product diversification, with perhaps the most complicated and disputed testimony offered in connection with damages calculations. A reasonably safe assumption is that an attorney handling an automobile personal injury case and an attorney representing a major corporation charged with violating the Sherman and Clayton Antitrust Acts would not pursue jury selection with the same eventual panel in mind.

Here then is an area uniquely appropriate for consideration by communication scholars. What type of juror is best suited for complicated and protracted litigation? How should voir dire questions be restructured and supplemented to explore nuances unique to this manner of litigation? How do we interpret voir dire responses in light of questions as to whether a potential juror would mind being on a case panel for up to six months? What sort of potential juror responds by indicating no concern with sitting for that length of time? Are certain backgrounds particularly appropriate for protracted litigation or are there distinct characteristics for a jury in an antitrust, criminal conspiracy, drug trafficking, patent or commercial fraud case? Can we, in fact, construct an acceptable, qualified jury to resolve factual disputes in such matters?

The preeminence of judge as opposed to attorney conducted voir dire furnishes an additional area of suggested consideration by the communications field. With juror questioning being conducted by trial court judges in lieu of trial counsel, the opportunity of the advocate to utilize voir dire to impress the jury is seriously diminished. Attorney imput into the voir dire process is substantially restricted at present to the proposal of voir dire questions in writing to the court. Quite often there is disagreement between adversaries and the court will entertain oral argument (and possibly legal briefs) on the merits of each side's proposed voir dire questions.

A skillful practitioner then must approach voir dire in a manner designed to work within this system of judge conducted questioning of potential jurors. Two distinct "targets" for jury selection study then exist: (a) the trial court judge needs to be persuaded as to the propriety of the offered voir dire questons as well as to the importance of asking the questions in a certain order; and (b) the jury selection analysios needs to be constructed based on the ordering of questions and the responses received. Rather than addressing the attorney's skills in conducting the voir dire, communications researchers should focus on issues pertaining to the ordering of questions, necessity for supplemental voir dire if certain answers are received and how best to communicate with the trial court judge in justifying the proposed voir dire questions.

Of course, with judge conducted voir dire and relative inactivity on the part of trial counsel, the nature of the attorney's courtroom conduct becomes more important. Can communications research suggest appropriate as well as inappropriate attorney activity during the court's questioning? For example, what nonverbal activities of attorneys may prejudice a client's case? Is there any recommended approach to note taking on juror responses so as to not key attorney activity into a selcted juror's answers to voir dire questions? Where trial judges conduct voir dire, can communications scholars suggest levels of attorney-judge interaction (e.g., objections, requests for supplemental voir dire, etc.) which may or may not prejudice the attorney or the client in front of the jury?

CONCLUSION AND FINAL RECOMMENDATIONS

There is a clear cry throughout this paper for the communications field to draw upon its resources and, in tandem with other fields, construct a woking, functional model for the attorney interested in departing from "time tested traditions" of jury selection in favor of a scientific or systematic approach. Individual research areas suggested are certainly of primary importance in actual practice, but the value of information generated on such targeted projects will fall victim to the lack of an integrated model for use by trial attorneys.

Constraints on such a model may be obvious, and feasibility limitations inherent in any such effort. However, the trial attorney seeking to pursue the systematic approach does not require that every question have an answer. To the contrary, practitioners tend to adhere to the "experienced approach" of standardized questions and whether answers to those questions are in existence. It is not important that every question have an answer. It is essential, however, that the practioner model identify the questions and note where no answers or clear interrelationships have been ascertained. For communications model to be followed, the practitioner needs to know that there is no answer or data to which he or she is not privy and to which the adversarial party may have access.

To restate an overriding theme, the legal profession clearly recognizes the worth of communications research in assisting the process of jury selection. Communications scholars, however, face an initial "communications problem" in relaying that information to attorneys and creating a sense of credibility in any proposed model or specific proposal. Selected cases and clients may furnish the "exceptional situation" where a specific jury selection study may be commissioned. Inroads into the practice of the majority of trial counsel, however, will require: (a) better use of legal journals and generally consulted materials to reach the legal community; (b) presentation of proposals based on research involving actual courtroom situations and experiences in contrast with artificial fact patterns and college students; and (c) a comprehensive analysis of "where we are" and what functional model can be offered to practitioners to employ and to be confident in employing communications based research.

PROPOSED VOIR DIRE QUESTIONS

The following "proposed voir dire questions" are illustrative of inquiries relied upon in practice by attorneys during the examination of potential jurors. In context, the questions identified were drawn from a formal defense request to the court in a civil suit for approval of voir dire inquiries. Where the court permits the attorneys to directly question potential jurors, these illustrations are in fact the prime inquiries of attorneys to the potential jurors.

1. I am now going to question the prospective jurors who are seated in the jury box concerning their qualifications to serve as jurors in this case. All members of this jury panel, however, should pay close attention to my questions, making note of the answers you would give if these questions were addressed to you personally. If and when any other member of this panel is called to the jury box, that person will be asked to give their answers to these questions. If any member of the panel does not understand a particular word or question asked, that person is under a duty to raise a hand and, when recognized, to ask for clarification.

2. Do you understand that it is your duty to view the evidence impartially, without letting any previous experience influence you one way or the other?

3. Do you understand that it would be a miscarriage of justice as to both the parties if a juror were to begin deliberations affected by some personal reservation?

4. In the trial of this case, the parties are entitled to have a fair, unbiased and unprejudiced jury. If there is any reason why any of you might be biased or prejudiced in any way, you must disclose such reason when you are asked to do so. It is your absolute duty to make this disclosure.

5. This trial will likely take [fill in a number] days to complete, though it may take longer. Will any of you find it difficult or impossible to participate for this period of time?

6. The nature of this case is as follows: [a brief summary of the case, identifying the parties, the operative dates, the substantive allegations and what is to be asked of the jury should now be offered; e.g., Plaintiff, "X," alleges that a contract was entered into with the defendant, "Y," whereby "Y" agreed to act as an exclusive sales agent for all west coast product distributions in return for a commission on sales to authorized distributors. "X" contends that "Y" created a scheme with certain distributors whereby products were sold to unauthorized accounts at significant retail price markups, with products reported as either stolen or sold at a lower price. "X" seeks to recover damages for lost inventory, wrongful commissions paid, retail price recovery and awards to punish "Y" for this alleged scheme. "Y" denies all of "X's" contentions, claims that all of his/her activities were consistent with the custom and practice in the industry, and pleads that "X" knew of this custom and practice and agreed to "Y's" practices. You will be asked to decide both the question of liability and the issue of damages.]

7. The plaintiff, "X," is represented by [insert name] of the law firm of [insert firm, if any]. Defendant, "Y," is represented by [insert name] of the law firm of [insert firm, if any]. Have any of you heard of or otherwise been acquainted with any of these parties or their attorneys?

8. During the trial of this case, the following witnesses may be called to testify on behalf of the plaintiff, "X": [List all witnesses who may be called.] The following witnesses may be called to testify on behalf of the defendant, "Y": [List all witnesses who may be called.]

(a) Have any of you heard of or otherwise been acquainted with any of the plaintiff's witnesses just named? Of the defendant's?
(b) Do you feel that in spite of such aquaintance you could listen to the testimony of that witness as you would any other witness, giving such testimony no more nor less weight than you would any other testimony?
(c) The parties are not required and might not wish to call all of these witnesses, and they may later find it necessary to call other witnesses.

9. Have any of you heard of, or have you any knowledge of, the facts or events in this case? Are any of you familiar with the commercial industry or products involved in this case?

10. Do any of you believe that a case of this nature should not be brought into court for determination by a jury?

11. Do any of you have any feeling or belief toward any of the parties, attorneys or witnesses that might be regarded as a bias or prejudice for or against any of them?

12. Do any of you have any interest, financial or otherwise, in the outcome of this case?

13. Have any of you or any member of your family or close friends ever had any connection with, or any dealings with, the plaintiff, "X," to your knowledge?

14. Have any of you, or any member of your family or close friends, ever had any connection with, or any dealing with, the defendant, "Y," to your knowledge?

15. Have any of you ever worked directly or indirectly in any commercial or business activity having any connection with "X" or "Y," or with the general business of [fill in the commercial line at issue]?

16. Have any of you served as a juror or witness involving any of these parties, attorneys or potential witnesses?

17. Have any of you served as a juror in any other case?

18. What was the case about? What was the verdict? Is it possible that subconsciously your prior experience might affect you in determining this case?

19. Has any juror or any member of his/her family or close friends ever been personally interested in the outcome of a civil case either as a party, a witness or in any other capacity? If so:

(a) In what regard?
(b) What was the case about?
(c) What was the verdict?
(d) Did the matter terminate satisfactorily so far as you were concerned? If not, why not?
(e) Is it possible that subconsciously your prior experience might affect you in determing this case?

20. Are any of you, or any member of your family or close friends, to your knowledge, presently involved in a lawsuit of any kind?

21. Have any of you, or any member of your family or close friends, had any special training in law, enforcement or investigative techniques, psychology, psychiatry, or any other fields of medicine?

22. Have any of you or any member of your family or close friends had any special training in business practices, accounting, inventory and supply management, sales or product promotion? [Here one should substitute appropriate specialty areas of training as directly pertain to the subject litigation.]

23. Have any of you expressed or formed any opinion as to the plaintiff's right to recovery of damages from the defendant in this case?

(a) Would it take the presentation of some evidence to convince you to change your opinion?
(b) Would you please explain how you came to form such an opinion and what that opinion is?
(c) Do you feel that you may have been so influenced by what you heard or read that you cannot render an impartial decision in this case?

(d) Would you be willing to have [six/twelve] jurors in your present frame of mind sit in judgment of you and your case if you were the plaintiff or defendant in this case?

24. It is possible that at some point in the trial, either counsel for the plaintiff or for the defendant will raise an objoection as to a certain questions or procedures. While it may seem that by these objections counsel are only delaying the trial or attempting to hide something, such is not the case. This is so because trials are conducted by rules, and if an attorney believes that a rule is being violated, he/she would be derelict in his/her duty to his/her client if he/she did not say so. Do you all understand that it is part of an attorney's role in the trial to make objections?

25. Objections raise questions of law which will be decided by the court. Do you understand that the jury is not to be concerned with those questions, nor are they to hold it against an attorney for making objoections?

26. Has any prospective juror, or his family, or any of his or her close friends, ever had any contact or association with "X" or "Y," or any of the employees or representatives of "X" or "Y?" If so:

(a) Please describe the circumstances of each contact or association.
(b) Are there any ill feelings towards "X" or "Y" arising from that contact or association?
(c) Is it possible that such feelings may, even unwittingly, interfere with your impartial determination of this case?

27. Has any prospective juror, or his or her family, or close friends, ever had any contact with [fill in possible interest groups, peripheral entities related to market or one of the parties]? If so:

(a) What did that contact involve?
(b) Did you come away from that contact with any bad feelings toward "X," "Y" or [fill in]?
(c) Do you feel it is possible that such contact might in any way, even unwittingly, interfere with your impartial consideration of this case?

28. The jurors are the sole judges of the credibility of the witnesses, and of the weight and effect of the evidence. It will be your duty as jurors to determine all questions of fact, and to decide those questions solely on the evidence presented to you in this case. If there any one of you who for any reason could not or would not do so?

29. The fact that the [fill in plaintiff or defendant entity, as necessary] is a party in this case must not affect your deliberations or verdict. [depending on nature of plaintiff-defendant relationship, offer burden of nondiscriminatory deliberation in voir dire, e.g., you may not discriminate between this defendant and natural persons or small businesses, and vice versa. Each is entitled to a fair and impartial trial. Do any of you have any belief or feeling for or against corporations that might prevent you from being a completely fair and impartial juror in this case?]

30. Will you follow the law as given to you by the court and require the same degree of proof in this case as you would in a case where "X" or "Y" was not a party?

31. Plaintiff is making a claim and it is incumbent upon "X" to establish all of the elements necessary to recover by a preponderance of the evidence, which I will further explain to you at the end of the case. Under the rule which governs the conduct of this trial, plaintiff has the privilege of putting on its witnesses first, after which the defense will present theirs. In the meantime, you should keep a clear and open mind and not make determinations of this case until all of the evidence has been introduced by both sides and I have instructed you in the applicable law. Is there any one of you who for any reason feels that they could not withhold their decision until that time?

32. Now it may be that some of you will be excused from serving on the jury for one of various reasons. This casts no reflection on the person excused and counsel's request that a juror be excused should not be held against him/her or against the client(s). The parties to this lawsuit are entitled to an unbiased and impartial jury, and it is their duty to attempt to have impaneled just such a jury. Are there any of you who feel that they could not hear this case without being affected by counsel's request that another juror be excused?

33. It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply that law to this case. To put it somewhat differently, whether you approve or disapprove of the court's rulings and instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law ought to be. Will all of you follow the law as given to you by the court in this case?

34. Do you know of any other reason, or has anything occurred during this question period that might make you doubtful of your ability or willingness to be completely fair and impartial as a juror in this case?

35. Each of you should now state your full name, where you live, your marital status (whether married, single, widowed or divorced), the number and ages of your children, if any, your occupational history, your spouse's occupational history, and the name of your present employer and your spouse's present employer, if any. Please begin with...

FOOTNOTES

---

[*] Robert J. Feldhake is associated with the law firm of Lord, Bissell & Brook, specializing in civil litigation and general corporate matters.

1. Schneider, Thomas (Hon.), "The 'Six-Pack' Method: A Way to Speed Jury Selection," Los Angeles Daily Journal, May 23, 1983, p. 11.

2. The Index to Legal Periodicals, a multi-volume index with supplements, was reviewed from January of 1961 through April of 1983, inclusive.

3. The Readers' Guide to Periodical Literature, a multi-volume index with supplements, was surveyed for the period March, 1970 through March 30, 1983, inclusive.

4. The Current Index to Legal Periodicals, a less well known research base, is a weekly summary of legal punlications compiled by the University of Washington School of Law, premised upon a review of 156 legal journals. Each weekly issue was reviewed for "jury selection" related materials from May 23, 1982 through May 23, 1983, inclusive.

5. See Trial (1st ed., §156); State ex rel Rhodes v. Saunders, 66 N.H. 39, 25 A. 588; Bryan v. Ross, 236 S.C. 299, 114 S.E.2d 97.

6. See Federal Jury Practice and Instructions, §1.01 (3rd ed.), p. 1; IV R. Pound, Jurisprudence 25 (West., 1959).

7. See, e.g., Singer v. United States, 380 U.S. 24 (1965); Similer v. Conner, 372 U.S. 221 (1963); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959); Patton v. United States, 281 U.S. 276 (1930).

8. See, e.g., Palko v. Connecticut, 302 U.S. 319 (1938) ("[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [jury trials]."); see generally J. Frank, Courts on Trial (1949); Peck, "Do Juries Delay

Justice?," 18 Federal Rules Decisions 455 (1955); Imlay, "Federal Jury Reformation; Saving a Democratic Institution," 6 Loyola L.A. Law Rev. 247 (1973); Burger, "Is Our Jury System Working?," 118 Reader's Digest 126 (February, 1981).

9. U.S. Const. Amend. VII ("[i]n suits at common law, where the value in constroversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ").

10. 47 American Jurisprudence 2d, Jury, §9 [citations omitted].

11. Id., §11; see, e.g., Re Monihan, 332 Mo. 1022, 62 S.W.2d 410; Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E.2d 809.

12. 18 U.S.C.A. §1861 et seq.

13. See, e.g., Duggar v. State, 43 S.2d 860 (Fla.); Re Mans, 178 Cal. 213, 172 P. 986; Walter v. State, 208 Ind. 231, 195 N.E. 268; see especially, Strauder v. West Virginia, 100 U.S. 303.

14. 28 U.S.C.A. §1863(b) ("[t]he names of prospective jurors are to be selected from voter registration lists, lists of actual voters, or other official lists of eligible voters of the political subdivisions within the district or division."]; see, e.g., Broadway v. Culpepper, 439 F.2d 1253 (fth Cir. 1971) (where voter registration list may be improper; failure to reflect cross section); United States v. Freeman, 514 F.2d 171 (8th Cir. 1975) (registration lists acceptable regardless of proportional representation on lists); see generally "Constitutionality of Calling Jurors Exclusively from Voter Registration Lists," 55 New York Univ. Law Rev. 1266 (Dec. 1980); Gelfand, Davis, "Jury List in Connecticut: Is the Voter Registration List Truly Representative?," 52 Conn. B. J. 449 (Dec. 1978).

15. Id.; see generally Brown, "Eliminating Exemptions from Jury Duty: What Impact Will It Have?," 62 Judicature 436 (April, 1979); People v. Mol, 137 Mich. 692, 100 N.W. 913; see also United States v. Hamling, 481 F.2d 317 (9th Cir. 1973); United States v. Diggs, 522 F.2d 1310 (D.C.Cir.1975).

16. Baldwin, McConville, "Representativeness of Juries," 129 New L. J. 284 (March 22, 1979); "Criminal Law - The Fair Cross-Section Requirement: Defendant's Friend or Foe?," Western New England Law Review 317 (Fall, 1981); "Representative Cross Section Standard: Another Sixth Amendment Fundamental Right," 21 Loy. L. Rev. 995 (Fall, 1975).

17. Roeder, "Impact of the Vicinage Requirement: An Empirical Look," 45 Nebraska L. Rev. 99 (January 1966); "Defendant's Right to An Impartial Jury and the Rights of Prospective Jurors," 48 Univ. of Cinn. L. Rev. 985 (1979); see, e.g., Thompson v. Utah, 170 U.S. 343 (1898); United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968), cert. denied 393 U.S. 961 (1969).

18. See, e.g., Dogin, Tevelin, "Jury Systems of the Eighties: Toward A Fairer Cross-Section and Increased Efficiency," 11 Univ. of Toledo Law Rev. 939 (Summer, 1980); Brown, "Some Recent Criticisms and Problems of Trial by Jury," 11 Univ. of W.A. Law Rev. 256 (June, 1974); Feremen, "Jury on Trial," 65 Current Legal Problems (1981); Gelfand, Davis, "Jury List in Connecticut: Is The Voter Registration List Truly Representative?," 52 Conn. B.J. 449 (December, 1978); "Voter Registration Lists: Do They Yield A Jury Representative of the Community?," 5 Univ. Mich. Journal of Law Reform 385 (Winter, 1972).

19. Glass, "Voir Dire in the Federal Courts: Diminishing the Effectiveness of Legal Representation," 44 Ins.Coun.J. 628 (Oct. 1977); "Voir Dire Flip Flop by the Courts," National Law Journal (April 25, 1983) p. 7; Fed. Rules Civ. Pro. 47, 24; see especially United States v. Bryant, 153 U.S. App. D.C. 72, 471 F.2d 1040 (1972), cert. denied 409 U.S. 1112 (1973) (court refused to hold that trial court must permit counsel to conduct voir dire); United States v. Amick, 439 F.2d 351 (9th Cir. 1971) (trial judge may conduct entire voir dire without counsel participation).

20. "Voir Dire Flip Flop by the Courts," National Law Journal (April 25, 1983) p. 7; "Attorney Participation in Voir Dire Examination in Illinois," 1977 Univ. of Ill. Law Forum 1145 (1977); Padawer-Singer, "Voir Dire by Two Attorneys: An Essential Safeguard," 57 Judicature 386 (April, 1974); But see 4 American Jl. of Trial Advocacy, supra at 523 ("[u]nder the present law in most jurisdictions, the trial judge has the perogative to either conduct voir dire himself or to allow trial counsel the freedom to perform their own voir dire.")

21. "Attica Cases: (People v. Attica Bros., 359 N.Y.S.2d 699); Chevigny, A Successful Jury Challenge in a Northern City," 11 Crim. Law. Bull. 157 (March-April, 1975); Forgie, "Challenge to the Array," 49 Austin L. Jl. 528 (Summer, 1975); People v. Jones, 9 Cal.3d 546 (1973).

22. *See* Suttin, "The Exercise of Challenges," 44 F.R.D. 286 (1967); "Challenges for Cause," 12 *Alberta L.Rev.* 327 (1974); "Voir Dire Examination - Challenges for Cause and Abuse of Discretion," 41 *Mo.L. Rev.* 632 (Fall, 1976); *see generally* 11 *A.L.R.3d 1159* (social or business relationship); 99 *A.L.R.2d* 905 (racial, religious, economic, social, or political prejudices as grounds); 2 *Am.Jur. Proof of Facts*, Bias or Prejudice, Proof No. 1, 250.

23. Winnick, "Prosecutorial Preemptory Challenges Practices in Capital Cases," 81 *Mich.L.Rev.* (Nov. 1982); Saltzburg, Powers, "Preemptory Challenges and the Clash Between Impartiality and Group Representation," 41 *Maryland L. Rev.* 337 (1982); "Peremptory Challenge and the Meaning of Jury Representation," 89 *Yale L. Jl.* 1177 (May, 1980).

24. *See* *Swain v. Alabama*, 380 U.S. 202 (1965); *People v. Buice* 230 C.A. 2d 324 (1964): "Curbing Prosecutorial Abuses of Peremptory Challenges; The Available Alternatives," 3 *West New Eng. L. Rev.* 223 (Fall, 1982); Younger, "Unlawful Peremptory Challenges," 7 *Lit.* 8 (Fall, 1980).

25. *See*, *e.g.*, Maier, "Houston Psychologists: Best Defense in Picking a Good Jury," 19 *People Wk.* 88 (Feb. 21, 1983); "Putting Juries on the Couch," 70 *N.Y.Times Mag.* (Nov. 28, 1982); Shell, "Scientific Jury Selection: Does It Work?," 7 *Barrister* 47 (Summer, 1980); Marquis, Poll, "Precision Occupation: Juror Often Votes for Conviction," 95 *L.A. Daily Jl*. 5 (October 22, 1982).

26. Werchick, "Method, Not Madness: Selecting Today's Jury," 8 *Trial* 64 (December, 1982); Thorne, "Impartial Jury and the Social Sciences," 5 *Journal of Contemporary Law* 43 (Winter, 1978); "Jurywork: Systematic Techniques," *National Jury Project* (1979).

27. *See*, *e.g.*, Fahringer, "In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case," 43 *Law & Contemporary Problems* 168 (Autumn, 1980); Brams, Davis, "Game Theory Approach to Jury Selection," 12 *Trial* 47 (December, 1976); Rothblatt, "Techniques for Jury Selection," 2 *Criminal Law Bulletin* 14 (May, 1966); Andrews, "Mind Control in the Courtroom," 16 *Psy. Today* 66 (March, 1982); "Jury Behavior: A Psychologist Examines Jury Selection," 5 *Ohio N. L. Rev.* 571 (1978); "Computers and Jury Selection: A Calculated Risk," 55 *Univ. of Detroit Jl. of Urb. Law* 343 (Winter, 1978).

28. Ryan, Neeson, "Voir Dire: A Trial Technique in Transition," 4 *Am. Jl. of Trial Adv*. 522 (1981).

29. "Putting Juries on the Couch," 70 N.Y.Times Mag. (Nov. 28, 1982).

30. Id.,

31. Two sources are highly recommended for a commentary on the systematic approach to jury selection: "Putting Juries on the Couch," New York Times Magazine, November 28, 1982; and "Voir Dire: A Trial Technique in Transition," American Journal of Trial Advocacy, 1981.

32. "Right to Privacy of Prospective Juror During Voir Dire," 70 Cal.L.Rev. 708 (May, 1982); Suggs, Sales, "Juror Self Disclosure in the Voir Dire: A Social Science Analysis," 56 Indiana Law Journal 245 (Winter, 1981); "Defendant's Right to an Impartial Jury and the Rights of Prospective Jurors," 48 U.Cinn.L.Rev. 985 (1979); "Voir Dire Limitations as a Means of Protecting Juror's Safety and Privacy," 93 Harv.L.Rev. 782 (Fall, 1980); "Does the Defendant Have a Right of Access to Prospective Jurors' Prior Voting REcords?," 38 La. L. Rev. 205 (Fall, 1977).

33. "Complex Federal Litigation: Can Jury Trials Be Constitutionally Avoided," 11 Univ. of Balt. L. Rev. 110; Krist, "Jury's Historic Domain in Complex Cases," 58 Washington Law Rev. 1 (Dec. 1982); "Suits Too Complex for a Jury," 118 Bus.W. (Sept. 22, 1980).

COMMUNICATION STRATEGIES AND RESEARCH NEEDS IN SELECTING JURIES

Ruth McGaffey

I am a speech teacher and a former debate coach. My area of scholarship is the theory and practice of First Amendment law. Like many debaters and debate coaches, however, I have always been sorry that I didn't go to law school, and I have shared the fascination of most Americans for the combat of the trial courts. During the past two years I have spent much of my time learning about legal communication. I am not, however, a consultant to trial lawyers. I teach a course in Communication and the Law, but I teach about legal communication, not how to do it. My own experiences in court have usually been to testify as an expert witness in obscenity cases. I have picked up some other legal information by osmosis. My husband is a managing partner in a large corporate law firm. I also have many former debaters who practice law and tell war stories. I do not consider myself an expert in legal communication and I approach this task as a student. I have read about jury selection and I have talked to trial lawyers.

My first impression is that the importance of jury composition has been overemphasized. If one considers the small number of cases which actually come to trial, the small number of those which are jury trials, and the even smaller number where the actual membership of the jury is critical, it seems like a rather insignificant part of legal communication. Jury selection, however, does not only consist of picking the jury members or of eliminating objectionable members. It is also a chance to analyze those people who will eventually be on the jury and a chance to start the persuasion process. I shall, therefore, consider all three functions of the jury selection process, beginning with an examination of the legal and social science literature, and then suggesting appropriate communication strategies and research needs.

I will omit three problems of jury selection, not because they are not important, but because each is worthy of a study in itself and because they do not lend themselves as well to consideration from the advocate's point of view. These problems are pretrial publicity, the death qualified jury and who should do the jury selection. The last is simply one of philosophy. Supporters of the adversary system argue that if both sides work as hard as possible to select a jury favorable to their position, the most unbiased jury will result. Skeptics argue that such an assumption depends on an unrealistic view of the equality of attorneys' skills and resources. I do not think this is the proper forum for such a discussion. I will limit my discussion to the strategic viewpoint. What do we know about jury selection that would help the advocate? What would it be helpful to find out?

SELECTING THE AUDIENCE: DOES JURY COMPOSITION MATTER?

The intuitive answer, of course, is yes. Speakers and speech teachers have always thought that who is in the audience counts. But, how do we know that? In the early days of our discipline we determined the answers to questions like this by asking and observing good speakers. From their experiences and our observations, we compiled a list of principles, wrote books and taught students. Eventually we became more systematic in our observations, interviewed audiences and tried to determine how they made their decisions. Rather recently, at least in terms of ancient rhetoric, we began to test some of the rules we had induced. Sometimes our common sense notions were supported; occasionally they were not. Many of our early experiments were limited to college sophomores. Now we are trying to see if real people react differently. As we consider the interrelation of many variables, our research becomes more and more complicated.

The legal community has gone through the same steps. They asked the great trial lawyers what was important and how they were successful. They have only quite recently become more systematic and scientific in testing common sense notions. Let us briefly follow this process.

What do trial lawyers believe about jury selection?

Some trial lawyers do not think jury composition is important at all. One writer notes, "There is one school of thought which holds that any twelve good men and true will do; that picking a jury is a wasteful, futile pastime. . . . . Disciples of this school say that all jurors are fair and impartial, at least in theory, and anyhow there is no way of finding out who is fair and who is not by merely asking questions. . . . . Take the first twelve men, put them in the box, swear them in, and--on with the trial."[1]

In a speech before the New York County Lawyers Association on the art of jury trials, Louis Nizer disagreed. He observed:

> There are two schools of thought on the selection of the jury. One school says that it is best, once you have satisfied yourself that the jury does not know counsel or litigants and has no surface prejudice in the case, to waive further examination and with a grand gesture to say: Jury satisfactory.
>
> Many good lawyers do that. They hope to profit from the fact that the jury will say, 'He has great confidence in his case because he doesn't question as much.'
>
> And then there is the other school, the school which says it is not given to you in other fields to pick your judges. You can't pick them in the state court, in equity trials or in federal court. But the law gives you an opportunity to pick the judges of the facts. It is a precious opportunity and it should be used with all the resourcefulness at your command. I cast my vote for the second school.[2]

An even stronger reaction was that of Judge Alan Morrill. He wrote, "There are only two reasons for a lawyer to take such a position; either he is lacking in aptitude for jury trial work or he has had little or no trial experience. Who is there who would dispute the wisdom in the statement of Thomas Fuller: 'A fox should not be one of the jury at the goose's trial.' Successful trial lawyers who have learned and applied the subtleties of proven techniques in the battle of jury persuasion give this phase of the lawsuit first priority in importance."[3]

Most trial lawyers seem to agree with Nizer. One could probably go back centuries for testimony to that effect, but in our own century, Clarence Darrow, not thought to be too unsuccessful in trial practice, noted, "Selecting a jury is of the utmost importance. . . . It goes without saying that lawyers always do their utmost to get men on the jury who are apt to decide in favor of their clients."[4] Many lawyers enjoy telling stories of how their selection of a single juror won a case for them. I heard one such story from James Shellow, a Milwaukee criminal lawyer. He told me that in a recent trial he decided that he wanted a particular woman on the jury. He told his colleagues that if he could have her, they could do the rest of the jury selection. They did not understand his preference, but agreed. After the jury had acquitted their client, Shellow talked with this juror. She said that she had decided early in the trial that the defendant should be acquitted, and that she figured out how to isolate and apply pressure to the one juror she thought would be in favor of conviction. As Shellow related the story to me, he said that he had noticed on the jury questionnaire that this woman had an M.A. in psychology. He called the university and discovered that her thesis was on small group decision-making. He decided that she was probably a skilled manipulator and when he felt that she "liked" him, thought that she would manipulate in the desired direction. I do not know if the facts support this story, but James Shellow believes it to be true. Other attorneys can point to a similar incident. I am sure that the lawyer for the Washington Post is very sorry that he did not strike one member of the jury in the libel suit against the Post brought by the president of the Mobil Corporation. An article in the American Lawyer describes the case.[5] Interviews with five of the six jurors indicated that the jury decided against the newspaper after ignoring or misunderstanding the judge's instructions. According to the article the jury foreman substituted his own legal test for that of the judge. The foreman, who was an employee in the Library of Congress law library and is now a part-time law student, evidently thought that the newspaper had to prove that its article was true. That is wrong, but he convinced the jury to decide against the Post on that basis. Situations like this explain why some attorneys challenge anyone who admits to knowing anything about the law.

So many trial lawyers do believe that selecting the right jurors is important. Rita Simon summarizes the point, "There is probably no area of jury behavior that trial lawyers believe more important or about which they believe they have more expertise than that of predicting the kinds of people who are likely to have the most to say and the greatest influence in the jury room. Trial lawyers are interested in the socioeconomic and sociopsychological characteristics of prospective jurors as a practical matter. They believe that selecting a jury with the right combination of social characteristics can mean the difference between winning and losing a case."[6]

Not only do these trial lawyers believe that jury selection is important, but they all have some theory about how to do it. In Rita Simon's book on the role of the American jury, she discusses these theories extensively. She reports that in interviewing attorneys associated with the Chicago jury project, researchers found that these 39 attorneys said that 50% of all their challenges were based on the juror's occupation and on the juror's race, religion or nationality. The next two most important factors were previous injuries or claims of experience and the lack of a sense of rapport between the attorney and the prospective juror.[7] Clarence Darrow once said that the last thing he looked for was intelligence on the part of the juror,[8] and apparently that is true of some other attorneys especially when they think they have a weak case. Simon notes:

> If an attorney believes he has a strong case, if he believes the facts are on his side, he will want intelligent, precise jurors, no matter which side he is representing. If, on the other hand, he believes the facts of the case do not support his client's claim, he will seek jurors expected to be sympathetic on grounds of identification rather than by a rational weighing of the facts.[9]

Others have mentioned the importance of selecting jurors who will "like" the defendant or as in the case of one attorney I interviewed, "like" the attorney. I asked this man how he could tell whether a juror would like him. He said that part of it was intuition, but that in general, intelligent women under fifty were the best risk. Different attorneys might have other criteria. Simon went through the trial procedure literature and identified a set of representative maxims. I am not going to repeat those here. She does, however, include a quotation from Michael Fried which summarizes the "lore." Fried writes:

> Groups traditionally believed to favor the prosecution as an agent of society include: (1) men; (2) Republicans; (3) upper income groups; (4) occupational groups such as bankers, engineers, and certified public accountants and others with positions of petty respectability and members of the Teutonic ethnic groups, particularly Germans.
>
> Groups who are traditionally believed to favor the defendant are: (1) women; (2) Democrats; (3) middle and lower economic groups; (4) certain occupational groups such as social scientists; and (5) minority racial or ethnic groups such as Latins or Jews.[10]

What do the legal textbooks say?

Just as early public speaking texts were based on the practices of effective speakers, so textbooks for the aspiring trial lawyer summarize what good lawyers have done or said. I consulted many of them, from the blatant recipe for success by Robert Simmons, *Winning Criminal Cases: How to Exploit the Eight Master Keys to Trial Victory*[11] to the less flamboyant *Fundamentals of Criminal Advocacy* by F. Lee Bailey and Henry Rothblatt.[12] Each stressed the importance of jury selection. Typical comments were, "The ability to recognize those prospective jurors out of any panel, who will be the most amenable to your trial guidance, is a key to advocacy success,"[13] or as James Jeans wrote in *Trial Advocacy*, *voir dire* is "perhaps the most significant procedure in the whole trial process and that consequently it is to be afforded such time and attention that such significance deserves."[14] I think it can be concluded that textbooks of trial practice consider jury selection to be significant.

Scientific jury selection: Does it work?

With the growing use of market research by politicians, advertisers and members of the media, it was only a matter of time until such techniques were applied to the selection of juries. Social scientists as well as experts in non-verbal education became available to assist, sometimes for very healthy fees, in selecting a jury. Saks and Hastie summarize some of the techniques and express some skepticism as to the results:

> Another part of the jury selection, which is really quite old, is investigation of members of the venire. Information about their backgrounds, habits, likes and dislikes, offers clues to their attitudes toward the case in progress. The new twist added by social scientists is the development of systematic "community networks," where people who "know people who know people who know people" serve as informants providing information about prospective jurors.
>
> In addition to psychological, paralinguistic, and kinesic observations, other techniques have, in one case or another, crept into the selection process. These include handwriting analysis and even astrological prediction. The value of any of these supplementary methods is questionable. . . . Even attempts to measure attitudes through unobtrusive nonverbal techniques seem to indicate that people can and do conceal their attitudes nonverbally as well as they do verbally.
>
> Regardless of the status of any of the supplementary techniques, there are some empirically verified techniques being used, notably demographic analysis. These do enable the prediction to some degree of people's attitudes toward specific trial-related issues as well as attitudes toward aspects of the criminal justice system. In addition to studies conducted for the purpose of jury selection in particular trials, many studies show a relation between demographic characteristics and attitudes. . . .

> This still leaves a major gap unabridged, however, being satisfied with predicting jurors' attitudes means that one is assuming that attitudes determine behavior. The assumption of attitude-behavior consistency is, however, a questionable one. Thus, we have yet to consider the final link: Do the attitudes predicted by the demographic and personality measures in turn predict juror decision making?[15]

A similar skepticism was voiced by Martin Kaplan and Cynthia Schersching who wrote in 1980: "First we don't always know the questions to ask because specific biases that may be detrimental (or favorable) to a particular defendant are unknown; second, we can't always be sure that the prospective juror is answering the questions factually or honestly as jurors may not always be aware of their biases or deliberately hide them; there are limitations to the number of dismissals of jurors; finally there is a more general bias of leniency/stringency which may go undetected, while we are looking for more specific responses to the case or issue."[16]

Nevertheless, scientific jury selection has been tried in several well known political trials and the side using it has not usually lost. Perhaps the most famous incident was that of the Harrisburg trial. It was reported in great detail in Psychology Today in 1973.[17] A group of social scientists helped defense attorneys select the jurors in the trial of the Harrisburg Seven. Their methods included a phone survey and in-depth interviews of 252 people who were representative of potential jury members. On the basis of these interviews the social scientists decided that the ideal juror was a female Democrat with no religious preference and a white co lar job or a skilled blue collar job. Further they concluded that a good defense juror would sympathize with some elements of the defendants' views regarding the Vietnam war, at least tolerate the rights of citizens to resist government policies nonviolently, and give signs that he or she would presume the defendants to be innocent until proved guilty. Of course, they were not able to seat only those jurors who fit that profile, but within their options, they chose the closest to it. The jury turned out to be hung, 10-2 for acquittal. Jurors were interviewed and a detailed description of the jury deliberation was formulated. The social scientists thought their work had been helpful and drafted recommendations for future defense teams. Those recommendations included:

1. Attitudes toward the defendants and their alleged crimes will often relate to demographic and personality variables, but patterns found in one area may not resemble patterns found in another.
2. Prospective jurors should be rated on both key background characteristics and key attitudes. If the two scores are not consistent, an effort should be made to get additional information to resolve the inconsistency.

3. Lawyers should identify jurors who conceive of their task as deciding whether the prosecution has presented sufficient evidence, rather than as deciding whether the defendants are guilty or innocent.
4. We recommend that defense teams rank each juror systematically on a dominance scale and use these ratings to guide the use of peremptory challenges.
5. By neglecting the nonverbal behavior of prospective jurors, we missed opportunities to detect attitudes, probable subgroups within the jury and bias. We should have noted these factors systematically.
6. Defense lawyers usually know what testimony will arise during a trial and they must try to anticipate juror's reactions.
7. To increase the chances for a fair jury, Federal trial rules should be revised to give both defense and prosecution the right to extended questioning.[18]

Subsequently, other attorneys began to employ the same methods. Courses in survey research as it applies to various kinds of trials have become standard fare at bar association conferences and in courses for continuing legal education credits. I was recently given a handbook used for such a course sponsored by the litigation section of the Wisconsin Bar Association.[19] This course was taught by Phillip Corboy who had himself commissioned the preparation of a detailed jury profile. The survey cost him $21,000 and involved interviews with 713 persons representing a cross-section of Cook County voters eligible for jury service. The case was a personal injury automobile case. The jury profile was prepared by Hans Zeisel, perhaps the nation's foremost jury expert. Corboy was quoted in the National Law Journal as stating that while he did not rely totally on the study, he may use the technique again. The article noted:

> He said he dismissed one juror solely because the man wore a toupee. 'It's a personal idiosyncracy with me,' he said. 'I don't want a man on my jury who is so vain as to wear a toupee.'
>
> Mr. Corboy said the primary thing the study told him was how he could use his 12 peremptory challenges in the case 'and that I wanted an all-woman jury.'
>
> 'I ignored the survey in the case of Mr. Magrini, however. It said he was a '4' I looked upon him as a warm-blooded Mediterranean, an Italian, someone who had a zest for life, who had lived and appreciated life.'
>
> 'Apparently I was right. He was the one who said he would offer $8 million and if the case had not been settled would not have gone below $5 million.'

> 'Picking a jury is part art, part science and part intuition--gut feeling. My gut feeling was that Mr. Magrini would be an excellent juror. On the other hand, based in part on the survey, I moved to dismiss one juror even though he had four teenage daughters.'[20]

Corboy is now teaching courses on how these survey techniques work. I asked several attorneys who had taken his course what they thought of it. Most thought it would require a potentially large verdict to justify the expense, but all thought the information would be useful.

I do not think that we know yet how helpful these methods are. Saks and Hastie point out that most of the trials where they have been used were conspiracy trials and that in comparable trials, whether the defense used scientific jury selection or not, the jury usually did not convict.[21] They note that interviews with the Harrisburg jurors revealed that many thought the government had such a weak case, they wouldn't have brought it to trial if they had not thought they could win because of popular opinion against the Berrigans in a conservative town like Harrisburg. Saks and Hastie conclude that evidence or lack of it may be the most important element in winning or losing cases and that "despite the apparently widely held assumption that the kind of person making a decision affects the decision made, the evidence consistently indicates that a jury's composition is a relatively minor determinant of the verdict."[22] Part of this they explain by the conclusion of small group researchers that individual differences account for little of the variation in group performances. They go further, however, and say that a greater proportion of the variance in jury verdicts is explained or at least strongly implied by studies that have measured manipulated differences in trial evidence along with variations in decision makers. I do not intend to summarize that research; I will simply repeat their conclusion:

> The studies are unanimous in showing that evidence is a substantially more potent determinant of jurors' verdicts than the individual characteristics of jurors. Indeed the power of evidence is so well recognized by jury researchers that when studying processes other than evidence, they must calibrate the evidence to be moderate so that it involves some variance to be influenced by the variables under study. Manipulating the evidence powerfully influences the verdict the group renders. This finding also is consistent with findings from elsewhere in psychological research. However, important personality and attitudes may be in determining overt behavior, they generally are not as important as stimulus features of the situation.[23]

Rita Simon also states that the facts so far do not substantiate the legal lore about jury selection. She writes:

> The evidence as manifested by empirical studies shows that there is some relationship between verdicts and the jurors' personal and social characteristics, and the relationship

> is in the expected direction; but the relationship is not strong. It is not nearly strong or consistent enough to merit as much attention and effort as the practice of challenging and selecting jurors has received from the bar.[24]

Simon is even more emphatic when she concludes, "We reiterate that attorneys may be spending time and money elaborating on a process that has only slight empirical support and that can provide little practical help."[25]

I found the most persuasive explanation for the lack of a strong correlation between juror characteristics and their verdicts to be that given by Saks and Hastie and substantiated by the Harrisburg social scientists. That is, jurors take their job very seriously. The special situation that is the jury deliberation transcends the elements that may usually determine a decision. Real jurors are more than real people. Saks and Hastie write:

> Our educated speculation is that this may well be due to the special social situation created by the court. Through learning outside the court and by the court's atmosphere, the judge's charges and the rules of the game, jurors adopt a role of "fairness" and "objectivity" which may be as extreme as they ever had or will have in their lives. That jurors are selected who do not have ongoing relationships with the parties or interests at stake in the case further enhances the success of the "objective factfinders" role. Commonsense assumptions that the personal politics and prejudice which characterize much of human life invade the jury box ignore the special situational characteristics of the court and the human relationships constructed there.[26]

Communication Strategies and research needs: Can we recommend anything?

On the basis of what I have learned, I do not think we are very confident in the importance of jury composition. The strategy is still to select the most favorable juries for our side, but I do not believe we know how to do this. The problem with the studies is that not enough of them have been of real jurors in real situations. This of course is not a new observation. Most researchers have regretted that they have been forced to use college students in their studies. Gerald Miller and his colleagues pointed out the problems presented by this fact in a recent Communication Monographs.[27] Even in the so-called scientific selection of jurors, where people are surveyed who have the same demographic mix as the potential jurors, these people are not surveyed in the act of being real jurors. If, indeed, the fact of their being in a very special social situation makes a difference, that element must be included in the studies, and I do not know how that is done. Until it is, however, it appears that all that can be recommended is for advocates to use both their intuition and all the available information to select jurors and then concentrate on the evidence in their case. That seems to be the most important element in winning or losing verdicts. As a student and teacher of argumentation, I am pleased to learn that the weight of the evidence and the clear presentation of that evidence may be more important than jury membership. I certainly hope that is the case.

AUDIENCE ANALYSIS: DO PUBLIC SPEAKING PRINCIPLES APPLY?

Perhaps the public speaking teacher can be more helpful in the second function of jury selection--the analysis of the people who will actually be on the jury. Some of the pages and pages of material on audience analysis should apply. Every public speaking text has something to say about it. I randomly selected two or three from my shelves last week. The first was Bert Bradley's Speech Communication: The Credibility of Ideas. Bradley writes:

> Audience analysis is the identification of those characteristics of the listeners--including their needs, wants, beliefs, attitudes, experiences, knowledge and values--that influence the way they will probably respond to the speaker's message.[28]

He later adds "the purpose of audience analysis is to facilitate audience adaptation--the tailoring of the speaker's preparation and presentation of the message to the particular listeners. A thorough and accurate audience analysis provides the basis for success in creating an aura of credibility through adapting to the audience."[29]

I will discuss credibility later in discussing the third function of jury selection. It is important to note, however, that if indeed evidence is the most important element or at least a very important element in jury decision making, it is important that the evidence be made clear to the particular audience and that the important parts of the evidence be emphasized in a way that will make them effective. Understanding audience characteristics should help decide how best to present the evidence in a case. Ernest and Nancy Bormann call the audience centered speaker "their knight in shining armor." I think their description of him might well apply to the legal advocate. They write:

> The audience-centered speaker understands that information has to be adapted to the listener and that the techniques discussed throughout this book are tools to use in adapting ideas to people. He knows about hypothetical examples and how he can use them to arouse the listener's interests. He knows what the selection of names for people and things means in terms of suggestions and he chooses his words carefully with the audience in mind. He knows about dialect's relation to classes of society, geography, race and ethnic backgrounds, and he understands how his own dialect and his own use of standard grammar will affect the people in his audience. He understands the importance of public dramas in which the members of his audience are most likely to participate; he thinks about their probably heroes and villiams and adapts his remarks to all these things. He considers every element of his speech in terms of the people who will be hearing it and the occasion when they will be hearing it. In the parlance of advertising, the audience-centered speaker thinks always in terms of what it (the audience) will buy.[30]

Speech teachers have told students for years that they should find out as much about the audiences as they can in order that they might adapt their ideas to those audiences. We have told our classes that they must adjust those ideas to the educational and intellectual level of their listeners, that they must use examples which their listeners will understand, create analogies and hypotheticals which relate the unfamiliar to the known. The text I am currently using suggests a demographic analysis of the audience which is very similar to those used by market researchers. The author proposes several questions which may help in adapting the "facts" to the audience. They are:

> What is the age of the listeners?
> What is the sex of the listeners?
> What is the educational level of the listeners?
> What is the political philosophy or ideology of the listeners?
> What is the ethnicity of the listeners?
> How homogeneous are the listeners?
> What are the cultural interests of the listeners?
> What is the economic status of the listeners?
> What is the religious affiliation of the hearers?
> Is there a common group interest?
> What are the occupations of the listeners?
> What knowledge do listeners have about the topic to be discussed?[31]

The answers to some of these questions may suggest points which the advocate needs to clarify. If he or she should discover that a member of the jury has some legal education, for example, but was allowed to remain on the jury, he or she may have to make a special point of being sure that the law is clearly explained. Some attorney's attempt to do this during voir dire; that will be discussed later. Others may request special instructions from the judge. Simple logic would seem to dictate, that this characteristic in one or more jurors calls for special attention.

It may be important to discover what the prospective jurors know or believe about the particular attorney. We know that credibility is influenced by what an audience member has heard about a speaker before the speech. Gerry Spence in Gunning for Justice remarks that he has discovered that many jurors believe that if a "hired gun" is brought in from outside to try a case, the defendant must be guilty.[32] His method of handling this pre-trial bias is to get the juror to admit that the thought had crossed his mind, and then ask him to promise to give him, the attorney, a fair shake as well as his client. Sometimes he does this individually, sometimes with the group as a whole and sometimes refers to it again in his opening or closing statement. Milwaukee's best known criminal lawyer told me that he considers his reputation to be such a negative factor that he would prefer to try cases out of town. He has received so much local publicity for the clients he defends and for the methods he uses that he is convinced many local jurors distrust him. He would rather deal with the problems of being an out-of-town gunslinger than deal with his own local reputation.

He does try local cases, however, and he is often the winner. He considers it essential to find out what the juror knows about him and what he or she thinks about him. He then may alter the manner in which he conducts the trial. He thinks it gives him a special obligation to appear completely fair, honest and trustworthy.

Many times in a civil suit the jury's task is to award damages. Every attorney to whom I spoke thought it was important to know the economic background of a jury in these cases. I was told about a suit where a man was killed while flying his private plane through bad weather. The plaintiff's lawyer is sure that he can prove that the designer and manufacturer did not test the defrosting system adequately. He thinks the more serious problem will be to convince the jury to award a significant amount of damages. His argument will be that if the man had lived, he would have earned a great deal of money; that eventually he would have left a large estate to his children; and that damages should compensate those children for the loss of that estate. The children did receive a substantial insurance settlement, however, and the attorney wonders what the attitude of the jurors will be toward a large additional award. The children are now wealthier than the average juror. I do not know the best approach to this problem, but it makes sense to me that how rich or poor the jurors are might make a difference in determining the best approach. What seems like a large amount of money to a working class college student may not seem like much to a suburban housewife. My colleagues at the university think they would be without financial problems if they earned sixty thousand dollars a year. My husband's colleagues who make several times that amount consider themselves in a financial bind most of the time. College students at the University of Wisconsin-Milwaukee have a different view of money than those at Marquette University. My daughter is a Dartmouth debater. She has a far different idea of a bare-bones debate budget than I do. What two minor children should be awarded for the death of their father could be determined by what the jury thinks about money as well as their ideas about inherited wealth.

The educational and intellectual level of the audience may suggest how evidence should be presented. In the experiment with the "Shadow Jury" which I shall discuss later, it was discovered that jurors had difficulty in understanding the evidence in a complicated anti-trust suit. Social scientists interviewing members of that jury thought that attorneys for both sides failed to realize that the jurors were not experts. They speculated that the attorneys had talked with the expert witnesses so often, and had discussed their testimony with each other so much, that it all seemed very simple to them. They forgot that it was all new to the jury members and that the educational level of those jurors was far below that of the expert witnesses. Every teacher recognizes the problem. We have been teaching the same stuff for years; it is simple to us. So, why can't the dumb kinds learn?

Remembering where the jury members live may be important. Alan Morrill believes that small town juries and big city juries are very different and that a lawyer must realize that difference.[33] Last summer

I overheard a conversation in a bar in Mercer, Wisconsin which illustrated that point. Mercer is a small, unincorporated town with just a few stores and businesses and a very high unemployment rate. Most of the people are quite poor. Several of the local citizens were discussing a woman who had been injured in a fall in front of the local bank. They were convinced that the bank was at fault in the way the steps and ramp were constructed, but they agreed that the woman was right in not suing. The banker was a nice man and the injuree did not want to stir up bad feelings. The banker was also a powerful citizen. Someone brought up another example of what sounded like a clear case of malpractice by the local doctor. This time the patient was in the bar and she said she didn't want to sue because she had to live in the town and she didn't want people to think she was a trouble maker. My husband was amazed at the attitudes expressed. He said that in Milwaukee people will sue on any excuse, and that if a lawyer were to try a case in Mercer, he'd better understand what those people think about trouble makers.

In many civil suits the facts are agreed upon. Someone was hurt because of something that happened. The question is whether anyone was negligent and if so how much he should have to pay. Often these cases appear to be the poor injured child or adult against a rich company. Last year a big case in Milwaukee involved two badly burned little girls from a family of illegal aliens against the Wisconsin Gas Company. The family lived in the basement of an old Milwaukee building. They tried to connect a stove up to a gas line themselves, bypassing the meter. They did it wrong; there was a huge gas leak; and an explosion which badly injured the children. The family sued Wisconsin Gas. The attorney argued that the gas company was negligent because there was not enough odor-causing chemical in the gas. He argued that since the family ate spicy food and the father worked in a tannery where the odors were strong, they could not identify weak odors and had no idea there was a gas leak. The attorney for the gas company showed that the chemical level was more than double the legal requirement and argued that the gas company had done nothing wrong. He claimed that it was clearly the fault of the person who had made the illegal connection. The jury awarded the children over a million dollars. One juror said later that it was obvious that the children needed the money, the f-mily had none and that since the gas company had money, they could afford to pay. I do know that the attorneys for the gas company were surprised at the verdict. They had apparently thought that logic and law favored their client, and had underestimated the sympathy of the jury and their determination to do something for the children. I do not know if it was possible for the gas company to win this case, but, I believe that the attorneys should have been able to more accurately evaluate their problem with the jury.

I think that W. Lance Bennett and Martha Feldman have presented the most convincing explanation of the importance of audience adaptation in the courtroom. These social scientists have published their work in communication journals and have written a book, Reconstructing Reality in the Courtroom.[34] They believe they can demonstrate that in a criminal trial at least, the struggle is between two storytellers. Each side tries to tell the most plausible story to account for the most facts. Which ever one the jury believes wins the case. Attorneys must understand what will make a story plausible to a particular jury. Bennett and Feldman write that "even the construction of a coherent story may not guarantee a just outcome if the teller and the audience do not share the norms, experiences, and assumptions necessary to draw connections among story elements. People who have different understandings about society and its norms may disagree about the plausibility of a story."[35] They go on to relate stories that "elicit different interpretations" which they argue are among the most painful things to observe in a courtroom. They say that their sample of trials included numerous cases where key story elements would not hold the same meanings to members of different subcultures. It seems obvious that in such cases, the attorney must try to find out what those might be through audience analysis and then adapt his presentation in order to make his story clear and convincing.

In my argumentation class students often argue mock civil and criminal cases. I have become aware of their story-telling techniques. In a recent class, two students were arguing whether the term "delivery" in a law prohibiting the sale and delivery of alcoholic beverages to minors was intended to apply to the "giving" of beer to underage girls by young men who were of legal drinking age. Several young men in the story had been arrested for giving their girl friends liquor at a picnic. After the students had argued the case, the remainder of the class acted as the jury. It was very interesting to see which arguments convinced which students. To some it was very plausible that the "cops" were intent on harassing students. It had never been mentioned by either advocate that the young men were students, but several assumed they were. Some assumed the picnic was a drunken brawl which was rowdy and dangerous; others that it was a civilized, small picnic. Neither description was given by anyone; each student seemed to be remembering some party he had attended. Each student advocate agreed that he should have given more details of the situation and tried to convince the jury that his version of the picnic and the behavior of all the actors was the most reasonable one. After several incidents similar to this, it seems very clear to me that in many situations, knowing details about the jury would help make whatever version one wanted to sell more convincing.

It seems obvious that an attorney should attempt to make his or her arguments as persuasive and as understandable as possible and that it is in the interests of his or her client to adapt those arguments to his or her audience in the best way he or she can. The common sense approach would be to give attorneys a good public speaking test with a chapter on audience analysis and help them figure out which questions they could ask in a particular case which might help them make the clearest, most effective presentation. I would make two further suggestions. Both have been tried. The first is to pick a "rehearsal" jury. That is find as many people like those on the jury as possible, and practice presenting parts or all of the case to them. Most attorneys sound out friends and spouses and colleagues, but these people may be far removed from the actual people in the jury. Certain pieces of complicated evidence which seem to cause problems of retention or comprehension could then be revised or simplified. Realizing that real jurors do not act like simulated jurors when they get into the box, it may still be possible to find out reactions which might be helpful.

The second suggestion is more complicated and more formal. That is the "Shadow Jury."

Audience Analysis During the Trial: The Shadow Jury

We tell our students that they must analyze the audience as they speak and after they finish as well as in preparation of a speech. An attorney may not get much helpful feedback from a jury. There is a new technique, however, which has been used to get continuing feedback. That is the use of a shadow jury. In such a case, the information gathered in the selection of the real jury, is used to select a shadow jury which will sit through the trial and provide some reaction to the attorneys. Such a situation was described in the American Bar Association Journal.[36]

This tactic was conceived by the counsel for IBM in the antitrust suit brought against that company by California Computer Products of Anaheim. Its use has been called "one of the most significant innovations in the application of the behavioral sciences to litigation."[37] The idea was that by recruiting a jury that would mirror the demographic and psychological traits of the actual jurors and by carefully listening to their reactions to the trial, it might be possible to evaluate the extent to which jurors were understanding the complex, technical matters being presented. They particularly hoped, since they were on the defense, that by knowing how a jury was reacting to the plaintiff's case, they would know better how to present their own. The plan was that every evening one of the consultants would talk with each member of the shadow jury, analyze their reactions, and then advise the attorney what those reactions were and what they might do about it.

Unfortunately, we do not know if it worked because Judge Ray McNichols directed a verdict for IBM without the presentation of the defendant's case. It does seem to offer a way to use the information gained from jury selection to improve the advocate's presentation, especially in cases where there is complicated material. Teachers know that by constantly asking students questions about their understanding, they are able to improve their own presentation. I see no reason why that principle would not also apply to lawyers. Of course these shadow jurors know they are not really making the decision, so some reactions may be different. However, the system may have some very practical benefits, particularly in long, complicated trials.

I have argued that an attorney should use the same principles of audience analysis as any good public speaker, that an analysis of his or her audience will help him or her make evidence and arguments more clear and more persuasive. I have suggested that prior to trial the advocate might use people similar to those in the jury to test his arguments and refine his or her presentation. Finally, I have proposed that a shadow jury be used in some selected cases to provide feedback during the trial.

PERSUASION DURING THE JURY SELECTION

The most important part of the jury selection process may not be the actual selection itself, but the impression that the advocate makes on the jurors. In legal terms this is often referred to as the "didactic" purpose of voir dire, and it has no constitutional status. As Bermant and Shaperd write, "Parties have a constitutional right to an impartial jury, and the law holds that the exercise of peremptory challenges is important in securing that right. But there is no right to or legal recognition of the examination's didactic function."[38] That may be true, but since the jury will usually first be introduced to the attorneys during this process, that jury will get some impression of them during voir dire. Wolfstone sums it up this way:

> The voir dire is the first event, and this is the time when the first impression is made. The voir dire, of course, cannot be a substitute for the opening statement, but when the trial lawyer has completed the voir dire examination, the jurors have already developed their first-impression beliefs, and if the examination was successful they should firmly believe that counsel is an honest, sincere man who is frank and candid and talks straight from the shoulder.[39]

Blunk and Sales are even more specific. They explain that while questioning to reveal prejudices is supposed to simply find evidence of such prejudices, another technique has developed around it. They call this the indoctrinational strategy and say that "it may be the most energetic and judicially deprecated use of the opportunities available during voir dire."[40] According to these authors the objectives of this strategy listed in order of importance to its advocates are:

(1) to ingratiate the attorney to the veniremen
(2) to make the veniremen aware of and to test their reactions to, certain aspects of the case.
(3) through the use of hypothetical questions, to analyze potential areas of veniremen prejudice which may arise during the trial. Indoctrination has been described as the process in which "the question itself is designed to have an influence on the juror and his answer thereto is only incidental or of little significance.[41]

Trial lawyers have probably always realized that the voir dire examination is their first opportunity to influence the jury and legal textbooks reflect that fact. One jury selection manual lists twelve purposes of voir dire. They are:

(1) to move the jury as a group
(2) to discover prejudice
(3) to eliminate extreme positions
(4) to discover "friendly" jurors
(5) to exercise "educated" peremptories
(6) to cause jurors to face their own prejudices
(7) to teach jurors important facts in the case
(8) to expose jurors to damaging facts in the case
(9) to teach jurors the law of the case
(10) to develop personal relationships between lawyer and juror
(11) to expose opposing counsel
(12) to prepare for summation[42]

More than half of those purposes have nothing to do with the actual selection of jurors. F. Lee Bailey and Henry Rothblatt are even more clear in their recommendations:

> The voir dire examination of prospective jurors offers you an opportunity to select fair, impartial jurors with enough intelligence to appreciate your defense. As you interrogate the jurors you meet them personally for the first time. You are given a chance to start selling them your defense. Your questions should educate each prospective juror as to the legal principles of your defense. This will enable them to understand the legalistice jargon of the court's charge. The answers to your questions may be effectively used in your summation. You argue that each answer is in reality a promise.
>
> Impress the jurors with your sincerity and fairness. Project yourself into the mind of each of them. Would you react favorably to a person who did not demonstrate complete fairness? If you, as defense counsel, do not appear sincere and fair from the very start a jury may never trust you. Address the jurors during voir dire as though you have confidence in their ability to decide the case fairly on the basis of all the evidence presented while giving the defendant the benefit of all the presumptions to which he is entitled. Do not, however, make the mistake of doing this through excessive flattery or cajolery. The most effective and subtle form of flattery is to express genuine interest in each juror and in his occupation and particular interests or abilities.[43]

James Jeans in Trial Advocacy writes that since voir dire is an introduction between the lawyer and the future fact finder, it is a time for some "social preening."[44] Most legal textbooks mention ingratiation and indoctrination as important functions of the voir dire. One attorney said he wanted the jury to understand their power. That is, he asked them if they realized that they could ask questions if they failed to understand what was going on and that they could refuse to deliberate until they understood the judges instructions. Then, he made them promise that they would not decide the case until they were sure that they did understand all the facts and the applicable law.

Many mention the importance of establishing trust. Gerry Spence told of selecting a jury in a case where a law enforcement officer was accused of cold-bloodedly killing another officer. He thought that the jury believed his client was guilty, but he did think he had established a rapport with them. He wrote:

> The jury trusted me, I thought. They were open, willing to discuss their feelings; we were talking as if we were a group of friends, now, unashamed of our frankness in this public place about private things, but trust creates the responsibility to be trustworthy, and should I betray them after they had trusted, they would mob me in horrible unison, me and Cantrell. I had not practiced law very long before I had learned the first truth of a courtroom--never lie to a jury. They are by far brighter with their twelve lives than I with my one lifetime's experiences. There is a composite wisdom in a jury that can be trusted if lawyers could only learn to tell the truth.
>
> . . . Perhaps my acceptance of people prejudiced against my client, my being open with them and, consequently, them with me, had provided Cantrell with the presumption of innocence after all. There can be no more important function of voir dire in a free society.[45]

How does communication theory and research apply?

I have found little written by communication scholars about the persuasive function of *voir dire*. In 1977, Richard Blunk who was then a law student at the University of Texas Law School and Bruce Dennis Sales who is a member of the psychology and law faculties at the University of Nebraska studied the results of the Yale Communication and Attitude Change Program and applied some of those findings to the process of persuasion during *voir dire*. They arrived at five propositions for such persuasion. Those propositions were:

1. Counsel may increase his persuasive impact on the veniremen by developing a perception of relevant similarities with them.
2. To the extent that counsel is able to develop perceived expertise in the eyes of the veniremen (specifically through a demeanor of confidence, efficiency, and moderate display of knowledge) his persuasive impact will be enhanced; however, emphasis on recondite points of law or a pedantic display of legal expertise may alienate the veniremen by a loss of perceived similarity.

3. To the extent that they view the attorney as being objective and unbiased, the veniremen should be more receptive to his persuasion. Therefore, counsel must be cautious in any persuasive attempt during the voir dire since juror awareness of such an intent could damage his valence; arguments should be couched in terms of "clear evidence will show that. . ." or "The prosecution must prove beyond a reasonable doubt. . . Evidence that falls short of that dictates that the defendant must be acquitted. . ." The Constitution of the United States and our American system of justice demands this result.
4. Since such abstract values as justice and equality before the law are positively balanced by the majority of the American public, linking these propositions to rules such as the presumption of innocence and proof beyond reasonable doubt should minimize the impact of potentially damaging aspects of the case.
5. To the extent that counsel may present specific aspects of the case to the veniremen including facts about the defendant and judicially acceptable defenses, the anchoring and the committing approaches to immunization against persuasion should serve as helpful voir dire techniques.[46]

It has been thirty years since those Yale studies. Can we add anything more to this information? I believe that our additional research would substantiate the importance of the jurors' making a public commitment to give the defendant a fair trial, listen carefully to the evidence, and any other such principles. Further, I believe that it makes sense and is consistent with what we know to "innoculate" the jury by forecasting both perceived weaknesses in one's case and strong arguments that may be presented by the opposition.[47] In addition it would seem that what we have learned about source credibility is applicable to this situation.

Much of the credibility research has attempted to discover the dimensions of source credibility. Many dimensions have been examined, and the same ones do not always appear. I suspect that is because in each study a different "role" is involved. Probably the dimensions which constitute credibility are at least slightly different in a teacher, a spouse or a president. Certainly the jurors' expectations might suggest that some dimensions of credibility would be more important in a trial situation than others. Competence has usually appeared to be an important part of credibility and it makes sense that it would help the advocate if the jury perceived him or her as competent. That is one reason why I doubt the wisdom of accepting the first twelve jurors with a "grand gesture." That strategy might make the jurors think that the attorney has great confidence in his or her case. On the other hand, I do not believe that juries expect attorneys to act that way and might very well think that the advocate is not prepared to do his or her job. I would suggest that it is important that the advocate appear well prepared, on time, with all witnesses and exhibits, well groomed and gives the appearance during voir dire that he or she has done his homework, knows something about the prospective jurors and is in control of the situation. He or she should be very aware that jurors are watching him even when he is just sitting at a table. As he or she is trying to gauge the nonverbal reactions of the jurors, they will be watching his or her facial expressions, gestures and general demeanor.

All of the research of which I am aware substantiates the intuitive feeling of attorneys that the jury must believe that the advocate is trustworthy. While some of this impression is gained through non-verbal impressions, it seems that it is probably important that the advocate be very careful to be accurate when he or she predicts what will be said and done in the trial. Public opinion polls have often indicated that Americans don't really trust lawyers. They expect "dirty tricks." I think that if the lawyer says something will happen and it doesn't happen; something will be proved and it is not, or the law will be explained one way and it is explained by the judge in a different way, the jurors' belief in the trustworthiness of the advocate will be damaged. That is why it makes strategic sense to bring out as soon as possible any weaknesses in your case, especially if they are inevitable, so that the jury will not only be prepared, but will not lose trust when those weaknesses appear.

Similarity has often been considered an element of source credibility, and Blunk and Sales were worried about the possible conflict between similarity and competency. I think they exaggerated the problem. While nobody likes a smart ass, I do not believe that most jurors would want to be defended by someone similar to themselves. Even if they use improper grammer, poor articulation and are disorganized, they would not want their attorney to do the same. Similarity may be more important between the defendant and the juror, but I believe that if the advocate can appear to be competent without "talking down" or being condescending, the jury will accept any perceived lack of similarity.

Many attorneys mention that they want the jurors to "like" them. In a 1977 study on credibility in the courtroom, likability turned out to be the most significant dimension of attorney credibility.[48] This study had the common flaw of involving college sophomores. Nevertheless, it substantiated to some degree what most lawyers think. A harder question is how one becomes "liked." We know that attractiveness may be part of it, and it probably also includes niceness, politeness and perhaps a sense of humor. It perhaps overlaps on trustworthiness and sincerity as well.

What about dynamism, sincerity and objectivity? I doubt if jurors expect an advocate to be objective. Mills and Aronson concluded in 1965 that if one has a bias and admits it, it may actually increase credibility.[49] The perception of an honest bias toward ones client should help an attorney. Some attorneys try to make it very obvious that they like their client, believing that the jury's liking of them may transfer to the defendant.

The attorney may not get to do much persuading during the voir dire, but some of it seems inevitable. It can either be a plus or a minus. It would appear that what we know about source credibility can be used to reinforce what most successful attorneys already intuitively believe about how to be persuasive while selecting a jury.

CONCLUSION

Jury selection consists of three parts. Those are the actual selection of jury members, analysis of those members and the beginning of the persuasion process. Lawyers, legal writers, social scientists and communication scholars have been interested in each of these phases and have written a great deal about them. The greatest amount of work has been done on the effect of jury composition on the results of the trial. To this point that effect does not appear to be as significant as most practicioners believe. Perhaps that is because research has not been able to duplicate adequately enough the jury situation. I have become convinced that more effort should be made to figure out methods by which the evidence and instructions of the trial, the content that is, can be made more comprehensible and can be retained more effectively. In addition, the use of surrogate and shadow juries before and during the trial have potential for testing some communication hypothesis.

I still believe that the jury's value is largely symbolic. But it is an important symbol. Richard Abel wrote in Law and Society Review that, "Its significance, best seen in the sensational trials that attract widespread attention, is as a reminder than an essential element in the legitimacy of our legal system is direct democracy."[50] I believe that the research indicates that jurors take their jobs very seriously, weigh the evidence carefully and try their best to be conscientious. That convinces me that this symbol is working the way it should.

Footnotes

Ruth McGaffey, Professor of Communication, University of Wisconsin-Milwaukee

[1] Richard Blunk and Bruce Dennis Sales, "Persuasion During Voir Dire," in Psychology in the Legal Process, ed. Bruce Sales (New York: Halstead Press, 1977), p. 41.

[2] Louis Nizer, "The Art of the Jury Trial," Cornell Law Quarterly, 32 (1946), 59-72.

[3] Alan E. Morrill, Trial Diplomacy (Chicago: Court Practice Institute, 1974), p. 1.

[4] James Jeans, Trial Advocacy (St. Paul: West Publishing Co., 1975), p. 169.

[5] Steven Brill, "Inside the Jury Room at the Washington Post Libel Trial," The American Lawyer, Nov. 1982, p. 1.

[6] Rita Simon, The Jury: Its Role in American Society (Lexington: D.C. Heath and Co., 1980), p. 32.

[7] Simon, p. 32.

[8] Jeans, p. 169.

[9] Simon, p. 33.

[10] Simon, p. 35.

[11] Robert L. Simons, Winning Criminal Cases: How to Exploit the Eight Master Keys to Trial Victory (Englewood Cliffs: Executive Reports Corp., 1981).

[12] F. Lee Bailey and Henry B. Rothblatt, Fundamentals of Criminal Advocacy (Rochester: The Lawyers Coop. Pub. Co., 1974).

[13] Simmons, p. 103.

[14] Jeans, p. 166.

[15] Michael Saks and Reid Hastie, Social Psychology in Court (New York: Van Nostrand Reinhold Co., 1978), pp. 60-61.

[16] Martin F. Kaplan and Cynthia Schersching, "Reducing Juror Bias: An Experimental Approach," in New Directions in Psychological Research, ed. Paul Lipsitt and Bruce Sales (New York: Van Nostrand Reinhold Co., 1980), p. 151.

[17] Jay Schulman, Phillip Shaver, Robert Colman, Barbara Emrich and Richard Christie, "Recipe for a Jury," Psychology Today, May 1973, p. 37.

[18] Schulman, p. 83.

[19] State Bar of Wisconsin, Civil Trial Techniques and Strategies, 1982.

[20] State Bar of Wisconsin, p. 51.

[21] Saks and Hastie, p. 66.

[22] Saks and Hastie, p. 66.

[23] Saks and Hastie, p. 68.

[24] Simon, p. 41.

[25] Simon, p. 46.

[26] Saks and Hastie, p. 70.

[27] Gerald Miller, Norman Fontes, Franklin J. Boster and Michael Sunnafrank, "Methodological Issues in Legal Communication Research: What Can Trial Simulations Tell Us?" Communication Monographs 50, No. 1 (1983), 33-47.

[28] Bert Bradley, Fundamentals of Speech Communication: The Credibility of Ideas (Dubuque: Wm. C. Brown, 1981), p. 77.

[29] Bradley, p. 77.

[30] Ernest Bormann and Nancy Bormann, Speech Communication: An Interpersonal Approach (New York: Harper and Row, 1972), p. 243.

[31] Bradley, pp. 79-85.

[32] Gerry Spence and Anthony Polk, Gunning for Justice (Garden City: Doubleday, 1982).

[33] Morrill, p. 3.

[34] W. Lance Bennett and Marsha S. Feldman, Reconstructing Reality in the Courtroom (New Brunswick: Rutgers Univ. Press, 1981).

[35] Bennett, p. 171.

[36] Donald Vinson, "The Shadow Jury: An Experiment in Litigation Science," American Bar Association Journal 68 (1982), pp. 1242-1246.

[37] Vinson, p. 1243.

[38] Gordon Bermant and John Shapard, "The Voir Dire Examination, Juror Challenges, and Adversary Advocacy," in The Trial Process, ed. Bruce Sales (New York: Plenum Press, 1981), p. 78.

[39] Blunk, p. 42.

[40] Blunk, p. 43.

[41] Blunk, p. 44.

[42] Ann Ginger, Jury Selection in Criminal Trials (Tiburon, Calif.: Law Press, 1977), pp. 280-287.

[43] Bailey, p. 83.

[44] Jeans, p. 167.

[45] Spence, p. 403.

[46] Blunk, pp. 47-51.

[47] W. McGuire, "The Effectiveness of Supportive and Refutational Defenses in Immunizing and Restoring Belief Against Persuasion," Sociometry 26: 189-197 (1961).

[48] Robert Rickun, "Credibility in the Courtroom," M.A. Thesis, University of Wisconsin-Milwaukee, 1977.

[49] Judson Mills and Elliot Aronson, "Opinion Change as a Function of the Communicator's Attractiveness and Desire to Influence," J. of Personality and Soc. Psych, 173 (1965), p. 1.

[50] Richard Abel, "Redirecting Social Studies of Law," Law and Society Review (Spring, 1980), p. 813.

COMMENTS ON JURY SELECTION AND JURY BEHAVIOR PAPERS

Rita J. Simon

The major themes that our speakers have addressed are the process of juror selection and jury performance during the deliberation. I shall have little to say about the first topic because both speakers are in basic agreement on the issue and I agree with both of them. Briefly, the composite view is that while trial lawyers have made a great to do about the importance of selecting the "right" jury, we don't know very much about the relationship between individual pre-dispositions and how a potential juror is likely to respond to a particular trial. We have each reviewed the same data base, some of us have contributed to that base and we know that there are associations between demographic characteristics and verdict preferences. By and large, higher socio-economic status persons are more defendant-prone in civil actions and more prosecution-prone in criminal trials. Older persons are also more prosecution-prone in criminal trials and defendant-prone in civil actions than younger ones. Prospective jurors of minority ethnic and/or racial backgrounds are more sympathetic to the defendants in criminal trials and to plaintiffs in civil actions. But as the speakers have been careful to emphasize, social scientists are dealing in probabilities, they are concerned with groups and with rates and trends; not with how a given individual will decide a specific case.

Related to the issue of how well social scientists can predict what a given prospective juror will do, is the question of how important the issue is. In other words, are background and demographic characteristics sharp enough predictors of verdict choices? Here again, I agree with Professor McGaffey who cites Saks and Hastie, and claims that the evidence jurors are exposed to is a substantially more potent determinant of jurors' verdicts than individual characteristics. It was my experience in listening to hundreds of experimental jury deliberations that the trial record, what the jurors heard during the trial in the courtroom, was most important in determining verdicts; and that jurors with different demographic characteristics did not respond very differently to the evidence.

Let me shift now to some areas of jury behavior in which the speakers and I do not see eye to eye: One, the influence of pre-trial publicity. Taylor and Wright cite the one study that reports the influence of pre-trial publicity in prejudicing jurors verdict. In my review of all the published empirical studies that had been conducted of pre-trial publicity, I concluded:

> Experiments to date (Feb. 1977) indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning, and greater detachment.

> Perhaps more importantly, recent experience in actual trial situations compels the same conclusion. The facts are that, despite substantial adverse publicity, Angela Davis, John Connally and John Mitchell all were acquitted. These verdicts may be the most reliable powerful data we have about jurors' ability to withstand pre-trial publicity.

Related to this issue is the argument that "the more a prospective juror knew about a case, the more likely he/she is to prejudge the defendant guilty. The results suggested that pre-trial publicity may be especially harmful to defendants."

Here again there are contrary data. In a telephone survey of registered voters conducted one week prior to an actual murder trial, 79 percent of the respondents said they had heard or read about the case; and three-fourths of them remembered details about the crime. When asked to describe their feelings about the case 65 percent of those who remembered something about the case said they favored the prosecution; of those who could not supply any details, 41 percent favored the prosecution. Sixty-nine percent of those who could supply details about the case and 65 percent of those who could not said that if they had more information or evidence they might change their minds. The respondents were then asked three questions:

> If you were called to serve on the jury in this case, do you believe you could hear the evidence, the testimony, the attorney's arguments and the judge's instructions, with an open mind?
>
> If you were accused of a crime such as this, would you be willing to have your case tried by a jury in the same frame of mind as your own?
>
> Do you believe the defendants could receive a fair trial in this community?

In response to the first question, 59 percent of both of those who could supply details and of those who could not, answered that they thought they would be able to serve with an open mind. Fifty-five percent of those whose supplied details and 65 percent of those who did not were willing to have "their case tried by jurors in the same frame of mind as their own. And, 67 percent of those who remembered details and 76 percent of those who did not believed that the defendant could receive a fair trial in this community.

Along these same lines, during the Watergate trials, John Mitchell's attorney submitted to the court the results of a private survey which showed that 75 percent of a national sample who had heard of the Watergate cover up considered the defendants guilty. In the District of Columbia, 84 percent thought them guilty; yet both John Mitchell and Maurice Stans were acquitted.

On a related matter bearing on jury performance, Taylor and Wright cited a study by Nagel in which he reported "that in criminal cases, jurors applied a standard of guilt substantially lower than the reasonable doubt standard of law." Our speakers also referred to a study conducted at the Institute for Study of the Trial in Florida in which the results showed those areas where the instructions were most difficult to understand including ... the meaning of legal terms such as ... reasonable about and its application. Here again, there is research evidence on the other side. About a dozen years ago, I conducted a series of studies that investigated ways in which the burdens of proof applicable in criminal and civil trials could be defined more precisely and more objectively. One of those studies involved a national survey of trial court judges in which the judges were asked to translate the burdens of proof in criminal and civil trials into statements of probability. The judges were also asked to guess how juries would translate the burdens of proof into probability statements. We found that:

> Judges believe that jurors understand what the burdens of proof are intended to convey and that jurors apply the instructions as they (the judges) would have them do.

A second study examined jurors directly. Using real jurors in a courtroom setting, we asked, "What would the likelihood or probability have to be that a defendant committed the act for you to decide that he is guilty." We compared the jurors' responses to those reported by the trial court judges and found little differences between them. Half or more of the jurors and the judges translated "beyond a reasonable doubt" to mean an 8.6 or higher probability. The model response for both groups of respondents was 10.0, the medians were 8.8 for judges and 8.6 for jurors, and the means were 8.9 and 7.9. A different situation prevailed when judges and juries translated "by a preponderance of the evidence." For the judges, the phrase means a little more than half, or a 5.5 probability. But the jurors' means and medians hovered around a 7.5 probability. For jurors, the difference between the criminal standard of beyond a reasonable doubt and the civil one of by a preponderance of the evidence is much less than it is for the judges. The judges make a sharper distinction between the criminal and civil standards.

With these points about pre-trial publicity and rules of law I have covered whatever areas of disagreement I have with Professors Taylor and Wright. Their summary of the pros and cons of the six-person jury I think is accurate and exhaustive. Their comments on the function of the deliberation as the opportunity to confirm the validity of individual decisions are ones I share.

For example, on the experimental juries with which I was connected, we found that 67 percent of the jurors would have reached the same decision if there had never been a deliberation. When Zeisel and Broeder interviewed 2,500 jurors who had sat on real cases in Chicago and New York they found that in instances where there was an initial majority (on the first ballot) either for conviction or for acquittal, the jury in about nine out of ten cases decided in the direction of the initial majority. Only with extreme infrequency did the minority succeed in persuading the majority to change its mind during the deliberation.

On the matter of the jurors' abilities to understand instructions, the doubts and fears of jury incompetence that Jerome Frank described almost 50 years ago has been echoed down to the present time. But as one sifts through all of the empirical data on jurors' performance, there is little basis for concern. Colesant and Sander, reported from their work in Michigan and Wisconsin that:

> Jurors' do use evidence in a legally relevant fashion. In reaching a verdict they use the rules of law set out for them by the judge. Legally relevant criteria are those most important to jurors in deciding responsibility.

Sealy and Cornish, in describing their work with British jurors commented:

> Contrary to common supposition, juries give real weight to an instruction to disregard relevant previous record, record wrongly admitted.

Of my own work on the jury I noted that:

> The jurors spend most of their time reviewing the trial record. By the time they have finished deliberating they have usually considered every bit of testimony expert as well as lay, and every point offered in evidence. What emerged most consistently from listening to jury deliberations was the seriousness with which the jurors do their job and the extent to which they are concerned that the verdict they reach be consistent with the spirit of the law and with the fact of the case.
>
> Jurors take their responsibility seriously; they check prejudices at the door of the jury room and recognize their special role as temporary members of the juriciary bound by rules of law and procedures that are foreign to their business transactions or informal conversations. Ordinary citizens are willing to accept these legal trappings and to work within them.

In closing I would like to make two suggestions for further research on the jury; one is a substantive suggestion. I think we need to find out more about how jurors behave in long trials. I am talking about the six-month to one-year anti-trust or a conspiracy action in which jurors are likely to be incarcerated. Some specific research questions that I would like to have answered are how well do jurors retain the information they are exposed to in the courtroom; what mechanisms do they use for collecting and retaining the information; what forms of social interaction develop among the jurors; how do they feel about serving on such juries; is expert testimony perceived and evaluated differently in long, complex trials than it is in the more typical civil or criminal case.

The other suggestion is a methodological one. Many of us have talked for a long time about "shadow jury". It would be worthwhile, I believe, for a group of us who have long been interested in and done work on the jury to write a proposal in which we sought funds to carry out research in which the "shadow jury" is used in a variety of criminal and civil trials.

Rita J. Simon is a Professor of Sociology at the University of Illinois.

RESPONSE PAPER: JURY SELECTION AND JURY BEHAVIOR

Nancy Gossage McDermid

> *The jury serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit . . . is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion . . . . Thus, the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.*
>
> Alexis de Tocqueville, Democracy in America (1835).

> *The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgement of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . . Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.*
>
> Taylor v. Louisiana, 919 U.S. 522 (1975).

This jury system--although hailed by Tocqueville as the "soundest preparation for free institutions" and described by the Supreme Court as the "guardian against the exercise of arbitrary power"--is under attack. Ruth McGaffey appropriately reminded us of the skeptical questions raised by some of the jury researchers themselves: "Does jury selection really matter? Is there any evidence that having or not having any particular person on a particular jury affects the particular verdict in any way?" Robert Feldhake alluded to a deeper cynicism which questions the very existence of the jury when he spoke of a credo held by some "that justice would not be sacrificed in the absence of a jury." However, those of us at this conference have another credo; we are among those who believe that the process and the results of jury selection are important.

This conference has a particular significance for me because even though we may be dedicated to the jury system, others are not. The perceived cost and delay and inefficiency associated with jury trials have given impetus to attacks on almost every aspect of the jury. The jury system is quite vulnerable to these assaults because the United States Constitution does not guarantee or require any of the specific elements of a jury trial which are discussed in these three papers--size of jury, nature of verdicts, process for challenges, extent of voir dire.

I accepted the invitation to participate in this conference with a very clear agenda: I wanted to urge all of us--lawyers and communication strategists--to produce more and better research on the jury because that research is needed to help protect and strengthen the jury system against current and recurring attacks.

Both McGaffey and Taylor/Wright have given us excellent summaries of the latest scientific techniques used for jury selection. Their reports on various trials show that an attorney with a big enough wallet can get all of the indices on prospective jurors: bumper stickers, handwriting, dress style, religion, non-verbal cues, vocal patterns, dogmatism scales, and more. Feldhake refers to these scientific techniques as "intensive, detailed studies of the panel." He complains that what is missing is a "systematic approach"--that there is now such considerable research that the trial attorney is often confused because there is no way to "order" the morass of verbal and nonverbal responses, personality characteristics, and socio-economic data. Sociologist Jay Schulman offers one way of "ordering." Schulman maintains that scientific, detailed jury research techniques are not all the same: some jury analyses utilize the clinical method; others utilize a demographic model:

> In the clinical selection model, an attorney customarily retains a forensic psychiatrist to provide expert advice during jury selection. This advice is based on the expert's pretrial preparation of profiles of jurors who will be "good" or "bad" for the defense, and on careful personality and attitude ratings of prospective jurors against these models during voir dire.
>
> In the demographic model, the juror profiles are based on a survey of current attitudes in the judicial district in which the trial will be held. In addition, behavioral ratings are made in the courtroom during voir dire by a variety of people, not by one professional psychiatrist or psychologist. Typically, the ratings are made by the defendant, defense counsel, social scientists, legal workers, and relatives of defendants.
>
> See Jay Schulman, "A Systematic Approach to Successful Jury Selection," Guild Notes (November, 1973), pp. 14-19.

One way of systematizing some of the plethora of work on jury selection would be an attempt to re-examine those trials which have used these two models, to ask whether there was any difference in the deliberative process, the exclusion and selection of particular jurors, the nature of the trial, the outcome, the jury feedback when the clinical method is used (Angela Davis, Pentagon Papers) and when the demographic method is used (Berrigan Brothers, Camden 28, Gainesville Eight).

In Jury Selection in Criminal Trials, Ann Fagan Ginger suggests that the basic difference between Schulman's clinical selection model and his demographic selection model "is in the sources used to construct the list of characteristics that comprise the 'good' and 'bad' jurors from the defense viewpoint. In the clinical selection model, the psychologist or psychiatrist constructs juror profiles from previous studies of large numbers of people made by psychologists and sociologists over long periods of time and for many purposes (usually not connected with jury selection)."

See Ann Ginger, Jury Selection in Criminal Trials (Tiburon, Calif.: Law Press, 1980), §§11.9-11.30.

Is one of these "scientific selection" models to be preferred? Can we obtain information on jury selection in "ordinary" criminal cases and in civil cases? Is the strategy used in jury selection in these "show case political trials" applicable only to other "show case political trials"?

Perhaps the work on jury selection would become more exciting to communication scholars and more valuable to the legal practitioners if Feldhake's views on the importance of jury selection were accepted. Feldhake strongly urges attorneys to consider "the possible makeup of a jury . . . even in the infancy of litigation"--when each file is first opened. The jury selection process--or the contemplation of that process--would then be an integral, functional part of every case--civil, criminal, show case, fender-bender--whether there is eventually a plea, a negotiated settlement, or a four month trial. The scientific investigation of the potential jury panel can give all of the parties involved valuable information, argues Feldhake, in all stages of trial preparation.

However, both McGaffey and Feldhake urge communication scholars not to devote all of their research energies to these "scientific methods" of profiling and picking jurors. They remind us that the vast majority of attorneys do not use the clinical or the demographic or any other "scientific technique." Most of McGaffey's lawyer friends and informants in Milwaukee and most of Feldhake's bar association colleagues and acquaintances attest to using "experience" or the "seat of their pants" as the primary and preferred method of jury divination. Too little descriptive research and too few case studies have been done on the so-called "non-scientific method" of jury selection, referred to by some as "the fix of the glittering eye." Theodore Koskoff, an experienced civil and criminal trial lawyer, in a speech before the American Trial Lawyers Association, described his method as "cerebration, observation, and then exclusion." Many attorneys, such as Koskoff, who successfully use the "seat of their pants" are not really satisfied with their own dependence on whims and hunches. Even these old-timers with their experience--and their victories--seem to be inviting the communication scholars to examine with them what they have been doing for so many years. Mary Timothy, foreperson of the Angela Davis jury, urged attorneys to use more than their vibrations and gut reactions for the picking of juries:

> Jurors have a right not to be stereotyped. Not being able fully to explore the juror's attitudes leads the attorney into the position of having to select the members by use of stereotypes: construction workers

> are for "law and order"--young people are politically liberal--blacks will never convict another black--women make decisions based on emotions rather than logic.
>
> See Mary Timothy, Jury Woman (Palo Alto, Calif.: Emty Press, 1975), p. 273.

Both the scientific and the seat of the pants methods trade on probabilities--trying to pick a fairly good array, being sure to exclude the unfriendlies and the meanies. Whatever the source or extent of the information on the jury/audiences, the communication scholar is desperately needed to suggest to the attorney/advocate what she/he should do to convince and persuade the jury/audience once the twelve (six or eight) members have been selected.

All three of the papers document how most of the work on jury selection has been done by the psychologist and the sociologist. Speech communication folk should be making more contributions to research on the jury. There is work which has already been done by the communication scholar on individual attitudes, needs, desires, beliefs--and how the successful advocate must analyze and then address the value system of the audience. Much is already known about how the individual functions in interpersonal interaction and how the individual is affected by the dynamics of the group. Communication scholars are accustomed to the concept of multi-dimensional roles and complicated communication models. The jury, for example, acts as judges of two adversaries competing in "debate finals"; sits as an audience in a theatre watching the witnesses, the defendant, the judge, the attorneys emoting and miming; and then finally becomes a small group making a decision. Communication teachers/scholars are familiar with each part of this process--argumentation, persuasion, audience analysis, verbal and non-verbal interaction, group process--yet very few forensic communication experts are found in the footnotes and bibliographies and citations; only a small number have served as consultants, on defense teams, or even as observers. This conference is a big step forward--a new commitment to collaboration between the legal and the communication professionals.

That collaboration is important if the communication scholar is to design research models that are really useful to the lawyer. Only in the collaboration can the researcher even recognize the important questions. For example, it is Feldhake, the lawyer, who raises the question of juror privacy--commenting that most of the researchers seem to "clamor to acquire every bit of information possible about the available jurors and to obtain release of that information well in advance of the trial." Too few researchers have shown any concern at all about this issue of privacy--although certainly in the traditional work of communication scholars, there has been recognition of the ethics of persuasion for the public speaker and of guidelines for self disclosure and trust in the interpersonal interaction. Why did the researchers, the experts, the scholars wait for a juror, Mary Timothy, to express concern about the intrusive fact-finding techniques? Ms. Timothy's outrage was expressed and published almost a decade ago:

> Jurors have a right to be free from investigation of their private lives. In the Angela Davis trial, the

> panel was investigated very thoroughly--both through the extensive public *voir dire* questioning in the open court with the representatives of the press in attendance--and also through the use of volunteer defense investigators who checked the neighborhoods in which we lived and the attitudes of our neighbors and fellow employees toward us. Psychologists advised the attorneys; and even a handwriting expert was used to analyze our suitability to serve . . . . In an effort toward more sophisticated jury selecting, dossiers would need to be compiled on all citizens and kept up to date . . . . And the jury system, devised as a fortification of democracy, could lead us to a police state!
>
> See Mary Timothy, *Jury Woman* (Palo Alto, Calif.: Emty Press, 1975), pp. 275-276.

The probers, the surveyors, the scholars did not even pause to listen to Mary Timothy. Their theory seemed to be "the more minutiae the better." Recently, a Superior Court judge in the San Francisco Bay Area ruled that attorneys *cannot* force the courts to release names of potential jurors weeks before a trial to do background checks on them (See *The Recorder*, San Francisco, June 13, 1983, p. 1). This decision appears to be the result of complaints from jurors, such as Mary Timothy, and from a few attorneys, such as Robert Feldhake, about the invasion of privacy. Perhaps if there had been more sensitivity about the ethics of this kind of research, the investigation of prospective jurors could have been more prescribed before the courts were forced to proscribe. Communication scholars should have been aware of how the attorney's own ethos and credibility can so easily be diminished if the jurors feel that their own privacy has been violated by the overly-zealous advocate. The communication scholar has participated in jury selection research only minimally and tangentially; thus, ethos and credibility have been discussed only minimally and tangentially.

The other research area which all three papers address is *jury behavior*--or the selected jury actually deliberating and making a decision. Taylor and Wright raise in their paper questions about the effect on jury behavior of jury size and the unanimous or non-unanimous verdict. I find most of the so-called "studies" on jury size to be an embarassment. As McGaffey reminds us, the studies are not of *real* jurors deciding *real* cases--so there should always be humility about "the findings." However, the real limitation of most of the studies is that there is so little recognition of the underlying premises of trials--which are *not* how quickly can the group decide or how close can the group come to agreement on some kind of "right answer." A lawyer, Siegfried Hesse, reminds all researchers that trials are based--not on the clock or on the wallet--*but on the premise that*

> . . . reasonable men and women may differ in their perceptions of the disputed facts or in their conceptions of the basic issues at stake. Otherwise the parties could settle their differences without the aid of a neutral fact finder, whether it is a

> judge or jury. Moreover, if everyone evaluated evidence identically, there would be no need for more than a single fact finder; each additional individual's perceptions and conceptions would be cumulative rather than potentially disparate in nature . . . . While in the juryroom, the jurors must in turn rely on their own perceptions of what transpired in the courtroom as well as their memories of those perceptions (perhaps days or weeks later). Finally, each juror must make sense of these different levels of perception and memory to participate meaningfully in the jury's deliberative process. At each stage of this complicated process, each juror necessarily brings to bear his or her personal experiences, biases, and quirks.
>
> The greater the number of jurors, therefore, consistent with a rational, deliberative process, the less influence will these individual threats to a just determination have on the ultimate verdict.
>
> See Amicus curiae brief by Siegfried Hesse for California Trial Lawyers Association in Colgrove v. Battin, 413 U.S. 149 (1973).

How many researchers on jury size even understand Lawyer Hesse's concern about these "individual threats to a just verdict"? Or how many studies on jury size discuss at all the need to represent the community and its values? Hans Zeisel, the co-father of jury research along with Harry Kalven, is one of the few students of the jury who begins and underpins all of his own jury research with a presumption that representation of community values is the essence of the jury. In his article, "And Then There Were None: The Diminution of the Federal Jury," 38 U.Chi. L. Rev. 710 (1971), Zeisel argued that although no individual twelve-member jury can be expected to be fully representative of all competing community values, it does not follow from that fact, that a six-member jury can represent community values equally well. Zeisel concluded that a six-member criminal jury will convict and acquit different defendants. Zeisel's statistics demonstrated that a six-member jury will reflect a standard deviation from community norms which is forty-two percent greater than that of a twelve-member jury. Siegfried Hesse, using Zeisel's analysis, concluded that six-member juries will inevitably render far more eccentric verdicts than will twelve-member juries.

The scholar's work is definitely limited and skewed by the level of that scholar's knowledge of the legal system, its history, its premises. For example, if the researcher on jury size is concerned about representation of community values and not completely obsessed with time and motion studies, then there may be different questions asked, different methods used, and perhaps different results recorded.

In a similar way, neither the communication scholar nor any competent researcher can design studies which speak to the effects of majority/non-majority verdicts without understanding the premises of the trial. Again Hans Zeisel has often warned that "even smaller majorities will make jury verdicts more conforming to what the judges would do . . . . The jury could wilt away, simply because there would no longer be any point in having one." Jack Peebles, an assistant district attorney in New Orleans, studied the statistics on how non-unanimous verdicts do indeed speed up the process and reduce the problem of hung juries; yet in the September 28, 1982, issue of Time magazine, Peebles is reported to have declared emphatically that "if a person goes to jail, it should be because there is no reasonable doubt about guilt. There should be a unanimous verdict." When a communication scholar designs the next study on the unanimous/non-unanimous verdict, will the concerns of a Zeisel or a Peebles be considered as part of the study--or will the test again be based on "time taken" to reach a "right answer"? What do most jury researchers know about "reasonable doubt"? How many of the jury scholars share Zeisel's concern that we could produce research results that could destroy the jury as an institution?

All three of the papers suggest a list of interesting questions for further research in addition to these issues of size and nature of the verdict. The papers and their bibliographies annotate the existing studies on all of these questions relating to jury behavior. We have so much more to learn about the effect on the jury of opening statements, closing statements, ecology of the courtroom, the judge's instructions, expert witness testimony, eye witness testimony, the defendant who does not take the stand, the credibility of the attorney, the evidence or facts of case, the role of the foreperson, pretrial publicity, etc., etc.

Whatever the subject of the inquiry, we will continue to be baffled by the over-riding question: How do we conduct jury research? The Kalven/Zeisel (1966) studies of 3,576 jury trials give us no real peek at the actual process. The American Jury compared actual jury verdicts with hypothetical decisions of judges. McGaffey suggests that researchers should not rely solely on comparisons with what a judge might have decided, or on the post-trial interviews with jurors, or on the mock juries made up of university students; McGaffey suggests use of the rehearsal jury and the shadow jury. Taylor and Wright suggest the use of carefully designed simulated trials. Whatever model is used, the researcher will never be able to find out what really goes on during the deliberative process of even one real jury because seclusion and secrecy are themselves significant factors in the jury process; if we observed or bugged the jury room, we would change the process.

The three papers hint at other areas for collaborative research. For example, the voir dire, as McGaffey suggests, seems to serve many purposes from the most blatantly indoctrinational to the most subtly interpersonal. The voir dire may indeed serve a myriad of purposes: to establish the credibility of the attorney, to exclude the "unfriendlies," to educate jurors about the facts of the case, to probe juror bias, and even to select twelve fairly good individual folk. However, the real test will always come when these twelve function as a group. As Theodore Koskoff suggested in his speech before the American Trial Lawyers Association: "The task is to motivate a group. Motivational techniques in moving a group as a group are different from moving twelve individuals." More research is needed on moving "the group as a group."

Additionally, any study of the voir dire must examine the variable of how serving on a jury actually affects a juror's biases, perceptions, attitudes. The individual jury member often shows an unpredictable capacity to rise to the challenge, "to stretch beyond personal foibles and prejudices, to strive in new ways to be wise and just and compassionate." (See Melvyn B. Zerman, Call the Final Witness, Harper & Row, 1977, which tells the story of Zerman's participation as a juror in a murder case). McGaffey mentions this variable when she says that "jurors take their jobs very seriously." Too many studies picture the jury as twelve malleable, biased, mediocre men and women who must be manipulated. With another attitude--at least a guarded respect for jurors' seriousness--researchers might become more interested in the suggestions of Taylor and Wright that there is a need to examine new ways of instructing the jury, permitting and encouraging jurors to ask questions at certain times, designing workshops for the jury, and soliciting more feedback from jurors at the end of trials.

There are ever-recurring and increasingly dangerous attempts all over the country to change the process--to reduce the number of jurors, to permit majority verdicts, to restrict the voir dire, to limit or even to eliminate peremptory challenges. Attorney practitioners and communication scholars may disagree on priorities or models or questions or methodologies--but those of us at this conference must continue to build on our shared belief in the significance and sanctity of the jury process.

As we return to our libraries, offices, classrooms, and courtrooms, let us remind ourselves of G.K. Chesterton's exaltation of the jury:

> When a civilized society wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary folk standing around.

So, for all of us--law and communication professionals alike--there remain much studying and strategizing to be done together if we are to understand and improve the really serious work of these ordinary--or not so ordinary--folk who serve on juries.

Note:

I owe a tremendous debt to Ann Fagan Ginger, president of the Meiklejohn Civil Liberties Institute, for giving me access to her own research and writings on the jury. Much of my inspiration and many of my sources--including material from Siegfried Hesse, Jay Schulman, Theodore Koskoff, and even G.K. Chesterton--are fully documented and developed in Ann Ginger's exhaustive study of the jury. If I had to respond in "50 words or less," I would say, "Read Ann Ginger's Jury Selection in Criminal Trials (Tiburon, Calif.: Law Press, 1980).

Nancy Gossage McDermid is an attorney and the Dean of the School of Humanities and Professor of Speech and Communication Studies at San Francisco State University, San Francisco, California.

RESPONSES TO JURY SELECTION AND JURY BEHAVIOR PROGRAM

V. Hale Starr: One of the things I would like is an evaluation of the methodology that has been used primarily by sociologists documenting attitude studies. One such attitudinal study that comes to mind had a seven item dogmatism scale, a one item authoritarianism scale, and questions such as, "Do you believe such and such an organization is a monopoly?" "Do you believe big is bad?" "Do you believe a corporation has a right to make a billion dollars profit yearly?" "Would you likely believe the views of one of the world's largest corporations or a new struggling corporation?" Questions such as these plus 21 items of demographic information were run through a computer and came out with a regression analysis on a point scale to predict the kind of juror that might or might not be desirable in the case. Now it is hard to come by these types of questionnaires and say for certain that they have a high degree of validity. Before we accept the concept that attitudinal devices can be of use to attorneys, we should look at the type of questions that are being asked, whether they are case specific or fairly general and whether or not they are using a process model of looking at all the demographic items, or whether they are looking at a regression analysis trying to decide whether being married, divorced, separated or single has any significant factor.

Lucy Keele: Just recently I read in the editorial page of the Los Angeles Times about a case in Los Angeles County. A prospective lady juror was asked if she was married and about her husband's occupation. She objected to these questions because she observed that her male colleagues on the same jury selection were not asked if they were married and about their spouses' occupations. She was cited for contempt by the judge, but a higher court has overruled that citation. The point I want to make is that when we get into research, we might discover that the attributes that jurors like about male attorneys might not be the same "like" factors at all for female attorneys. I urge those of you doing that research to separate out male-female "like" attributes.

Leroy Tornquist: I want to raise some storm clouds for those of you doing jury research. Those who are doing the research are doing it for those who can afford it, except in a very few cases. And, as you do it, it is bringing more criticism to the litigation process because it is looking as if the methods of scientific jury selection give an advantage to those who use it. Furthermore, those who are using it are very wealthy and can afford it which brings more criticism of the litigation process. Those of you involved in jury research are going to have to be ready to answer that criticism.

Irving Torgoff: I'm becoming aware of the issues of jury selection and I'm faced with this concern. The researchers who claim to be scientists say, "It doesn't make any difference about jury selection," and the consultants who claim to use scientific methodology say, "It does make a difference and we are effective." Then there was a statement that "those who have it" have an even greater chance to be successful. Who, after all, can hire a consultant? I assume the lawyers who have more resources at their disposal do the hiring. So, I wonder if those successes of the consultants are in spite of their services?

Robert Feldhake: In large civil cases, it is not a question of what side has the unique resources; it is often a question of one side saying, "We will take a portion of those resources and allocate them to a jury study." The other side says, "We will instead take our resources and allocate them to the retention of fifteen experts in earth movement patterns as opposed to twelve." I think it is a matter of resources, to be sure. But, it is mainly a question of how you choose to apply them. By the way, I think when you have roughly equal situations, something like a juror study can absolutely make the difference.

Rita James Simon: If you are serious about trying to get answers to questions about jury behavior and jury selection, then you need to collect data. There are no data. What you really need to recognize is that you can get data on what happens in experimental juries and how jurors voted in specific cases *ad nauseum*. Some people even follow jurors into the jury room and hear what they say in deliberations and connect it back up with what they said either in the verbal voir dire or in the written information they put out. So, you can get data *ad nauseum*! What the data will show is that we don't know very much. We know there are certain trends. If you ask the trial consultants for their data, with all due respect, they don't really have it. What you really need is to take the group of jurors that you selected and follow them through, and then you need to have the group of jurors you rejected for the same case deliberate and reach a verdict. You can't do this just once; you have to do it hundreds of times. Then let us look at the data. If you've got that kind of data, publish it!

Gerald Miller: The panel is really jumping around three or four different areas of research having to do with jury selection and jury behavior. One of the problems that bothers me is that when I hear jumping from one area to another, I hear changes in interpretation. Let me give you an example. It seems to me if one is going to argue that the personality attributes, attitudes and characteristics of jurors are relatively unimportant and jurors are indeed capable of rising above those and looking at the evidence and the arguments, then you really ought to argue that this concept holds for six people as well as twelve. When we start talking about six person juries, I've heard the interpretation that they come up with a certain kind of biased opinion mostly for the defendant in civil litigation and the prosecution in criminal law. That might be because you are lopping off certain persons in the selection process of going from six to twelve. It seems to me it is one thing to argue on one hand that it shouldn't make a difference who is on a jury, and then use the six-twelve variable for an explanation as to why you are getting a different verdict when you reduce the number of jurors. There is an inconsistency here. It seems to me you can't have your cake and eat it too. You can't take one area and say it doesn't matter over here and then come over here to another area where we've got some other kind of finding and take that interpretation to explain why that finding is happening. Either the jury size variable makes a difference, or it really doesn't. And that ought to hold across topics.

Nancy Gossage McDermid: Part of the problem is that this is a very complicated process. For example, I think of a lawyer in San Francisco who says, "What the hell. Give me the first twelve. They are as good as whatever." He holds to the theory that "they are putty in my hands". You go all the way from that to whatever the other extreme is--the person that does all the research, etc. I think the truth lies somewhere in the middle. Naturally, that is uncomfortable for attorneys. The process of jury selection is somewhere in the middle which means that I don't do away with seat-of-the-pants hunches, nor do I rule out the research about demography, attitudes in the community or whatever.

Joyce Tsongas: As a consultant, I have never been so myopic or focused that I simply relied on one survey to pick juries. I take more of an eclectic approach. The question I would like to see addressed in the research is how to integrate all the approaches in selecting a particular jury.

K. Phillip Taylor: I don't want anyone to leave with the assumption that the trial begins and ends with voir dire and nothing happens in the middle. As communciations people, we are primarily concerned with message strategies. The reason you do scientific jury selection is not because you can guarantee what is going to happen in deliberations, but the selection process will help you (the attorney) better understand your audience and develop a message strategy.

Lucy Keele: At the Eastern Communication Associaton convention this spring, I attended a provocative panel where persons spent the better part of last year investigating all the literature that has come out in speech communication in the last twenty years. A scathing indictment was launched that the work that has been done in our field could have been better done, and, in fact, was being better done in other areas. The criticism was made that we in communication weren't applying any of these principles for the purpose of altering communication. I don't want to defend their papers, but I want to say to you, "Do you maybe get the feeling that twenty years from now somebody is going to do a twenty-year perspective on legal communication and we're going to find out that we still haven't told attorneys what to do with their messages and that we haven't told them about the communication variables that need to be changed because of our research?" Maybe we'll do the research as well, but maybe we won't be doing anything significantly different than what our colleagues in other disciplines are doing. What are we doing in speech communication that is unique?

K. Phillip Taylor: Let's hope that we will be approaching some answers to that as we look at the message strategies for the trial. I'm afraid I feel as pessimistic at times as perhaps you do. One attorney we have at this conference told me that we have not told him anything he could take back to his practice. I'm depressed by that and we should do more.

Rita James Simon: I think you're asking the wrong question. Why, as speech communication people, do you think you can predict how Person "N" is going to behave tomorrow, in the jury or in any other setting? I think you are asking the kind of questions about how specific human beings are going to behave in highly complex situations. Only when you are a very sophisticated clinician or have lived with a certain subject for forty years, do you have a running shot at it. Why are you playing God? At best, all you can say might be that for people who have a range of scores that go from .06 to .09 on a Monday, Wednesday or Friday, maybe we should communicate this kind of message and hope that that will integrate it with all the other things they see or don't see.

Robert Feldhake: From the practicioner's point of view, I don't want to know the distinctions between 8.9 and 9.1. For communicators to get through to us and cause us to change our practices, research persons and speech communication teachers have to use their skills to find out the information and then get it directly to us. I don't need to know percentages; I don't think you need constant summaries of charts. We need a more functional and pragmatic approach.

DIRECT AND CROSS-EXAMINATION

PROGRAM COORDINATOR

ERWIN CHEMERINSKY
COLLEGE OF LAW
DEPAUL UNIVERSITY

PROGRAM CHAIRPERSON

THOMAS A. MAUET
COLLEGE OF LAW
UNIVERSITY OF ARIZONA

EXAMINING WITNESSES - GOOD ADVICE AND BAD

Elizabeth F. Loftus
Jane Goodman
Chris Nagatkin

I. INTRODUCTION

Advice to lawyers on how to examine witnesses is plentiful and freely available. There is advice on direct and cross-examination techniques, advice on questioning friendly witnesses, hostile witnesses and expert witnesses. There is old advice and new, and undubitably, some that is borrowed and some that is blue. However, little if any scrutiny has been applied to any given aspect of trial lawyers' lore to ascertain whether it is sound. A major goal of this paper is to apply such scrutiny.

We began our analysis by examining a variety of sources of advice to lawyers on how best to examine a witness. We looked at the classic book, The Art of Cross-Examination, by Francis Wellman(1) and several other more recent sources, containing advice for defense-oriented lawyers(2) advice for prosecution-oriented lawyers(3) and advice for civil lawyers(4). We found pearls of wisdom with which no one could reasonably disagree, such as "Be prepared" and "Don't be boring," also some advice which seemed somewhat more intriguing, such as "Reveal any negative information yourself" and "Put the witness with more details on the stand after - not before - the witness with fewer details." From these sources we culled numerous tidbits of advice applicable both to direct and cross-examination, as well as some advice applicable to each alone. Our goal is to assess the viability of this advice in light of current psychological literature pertaining to witness examination, with a view to determining which advice should be followed and which should be discarded.

II. ADVICE IN GENERAL

a. Prepare your witnesses.

Lawyers are generally advised to prepare their witnesses for both direct and cross-examination, and not to put a witness on the stand without preparation(5). One of the reasons proferred for witness preparation is the effect it may have on witness confidence and, hence, credibility. Recently, an experiment to test the connection between confidence and credibiity was conducted by Wells, Ferguson, and Lindsay(6). Eyewitnesses to a staged theft identified a suspect from a six-person photo lineup. Half of the witnesses were briefed for seven minutes about the upcoming cross-examination by the defense attorney. Other witnesses received no preparation. All witnesses were questioned by means of both open-ended and closed-ended questions. Subject-jurors then viewed videotapes of these examinations and judged the witnesses' confidence and credibility. witness confidence was perceived to be higher for briefed than for non-briefed witnesses, and, as a result, the percentage of guilty verdicts increased from 30.5% to 50.5%. However, Wells et al. also found that preparation had a more pronounced effect on the credibility of inaccurate witnesses than it did on that of accurate witnesses (28% versus 5%). Consequently, a lawyer may wish to submit a cautionary instruction to jurors to the effect that witness confidence is not necessariliy correlated with accuracy.

Although most attorneys think of the preparation phase as an opportunity to rehearse the content of the testimony, preparation can also have a significant effect on the witness' speech style. Speech style, in turn, can have a significant effect on credibility. A number of investigators have studied the effects of a speaker's speech style upon listeners. For example, Labov(7) and Lambert(8) have shown that the language variety used by a speaker influences the listeners' subjective reactions. This was confirmed by Giles and Powesland(9), who showed that the use of general American dialect results in a more positive response than the use of a regional or foreign dialect of English. Researchers who have investigated the use of language within the courtroom have reported similar findings. Parkinson(10) found that defendants who were more polite and who spoke in more grammatically complete sentences were acquitted more often than other defendants. Research along these lines suggests that attorneys should take care to prepare their witnesses on more than the content of the communication. They should also pay attention to the witnesses' speech styles.

Analyses of courtroom discourse by Conley, O'Barr, and Lind(11) added another dimension to the importance of speech styles to credibility. They identified "powerful" and "powerless" speech styles. Powerful speech styles were displayed by witnesses who spoke without hedging ("I think," "it seemed like," "kind of," "sort of"); without hestitation ("well," "uhm," "er"); without over-politeness ("sir," "please"); without overusing adverbial intensifiers (surely, definitely, very); and without a questioning intonation. In an experiment in which the power of speech styles was manipulated, Conley et al. found that men and women who testified by omitting these "powerless" features from their speech were rated as more credible, more competent, more intelligent, and more trustworthy than men and women who included these features in their responses. This suggests that lawyers should rehearse their witnesses in order to avoid use of the undesirable speech characteristics in the courtroom.

Witness credibility is also enhanced by the use of standard formal English as opposed to jargon or "hypercorrect" speech. O'Barr(12) has identified four distinct registers of speech used during the course of many trials; formal legal language, containing much professional jargon; standard American English used most frequently by lawyers and witnesses; colloquial English (closer to everyday language) used by some lawyers and witnesses; and subcultural dialects, such as Black English. These observations led researchers to investigate the spoken language used by lay people in court, identified as "the courtroom register"(13) or "hypercorrect speech"(14).

First, four common lexical and syntactical features typical of the courtroom register used by adult witnesses who have little or no direct experience with the courtroom situation were isolated by Platt(15). Specifically, her analysis of trial transcripts revealed the following: 1) legal terminology, e.g., "allegedly," or elaborate forms of expression, e.g., use of alternates, "residing or living"; 2) apologetic explanations or justifications; 3) hedges, e.g., "as I recall," "I believe," "I think," "supposedly"; 4) use of proper nouns in referring to the defendant.

The second phenomenon, hypercorrect speech, occurs when a witness attempts to "talk up" to the courtroom audience by emulating the formal speech style used by judges and some lawyers. For example, a slightly injured patient was described by the witness as "in less than dire condition," and the period of three days was paraphrased as "seventy-two hours." Police talk can also be described as a variety of hypercorrect speech. Compare "The suspect exited his vehicle" with "The suspect got out of his car(16)." In an experiment designed specifically to measure the impact of these speech variations, it was found that subject-jurors were sensitive to these linguistic subtleties, perceiving the hypercorrect speakers as significantly less convincing, less competent, less qualified and less intelligent than speakers using standard formal English(17).

Witnesses should also be instructed not to interrupt the lawyers - and lawyers who wish to be favorably received should also keep interruptions to a minimum. Researchers have investigated the effects on observers, such as jurors, of simultaneous speech in the courtroom, that is, instances in which the witness and the examining or objecting attorney interrupt each other. Conley _et al_. compared conditions in which there were no witness-lawyer interruptions, instances in which the lawyer interrupted the witness, instances in which the witness interrupted the lawyer, and instances in which interruptions were generated equally by witness and lawyer. Observers' assessments of the lawyers in all three latter conditions were negative. In any of the interruption conditions, the lawyers were rated as less intelligent, and observers considered their conduct to be unfair to the witnesses.

In conclusion, witness preparation is important. The advice traditionally offered to lawyers can be considerably more specific than mere admonitions to rehearse the content of the testimony. Rather, witnesses should be coached to speak in a straightforward manner, using a powerful speech style. They should avoid hypercorrect speech or unnatural formality, and should endeavor to use standard American English. Furthermore, witnesses should rehearse the art of never interrupting their examiners....at least on direct examination.

b. Formulate questions carefully.

Lawyers are frequently advised to use plain, simple language during witness examinations, and particularly to avoid jargon such as "legalese" or "police talk"(18). This advice seems sensible, especially in view of psycholinguistic research indicating that jurors do not understand legal jargon(19). Although these studies specifically address jurors' understanding of judicial instructions rather than witness examinations, the findings would almost certainly apply to the latter.

In framing questions to be used during witness examinations, Mauet advocates the careful selection of words and phrases which will create an advantageous impression(20). Danet argues that lexical choice is an important part of persuasion, and views the questioning process as the central means by which reality is constructed and negotiated in the courtroom. She concludes that the outcome of the examination is as much a function of the verbal strategies and choices of the participants as it is of the supposed facts of the case. This theory is borne out by Danet's(21) study of a controversial manslaughter trial in connection with a late abortion. She found as many as forty competing terms were used to refer to that "result of pregnancy," some clearly favoring the prosecution and others favoring the defense. In this abortion case, semantic issues were so important that the defense attorney sought an order to prevent the use of certain terms by the prosecution. As a result, the judge disallowed the words "smother," "murder" and "baby boy."

Danet examined the trial transcript to determine the extent to which a given witness was susceptible to "semantic contagion," tending to pick up the words selected by the opposing side during the questioning process. The resistance of a witness to semantic contagion is clearly demonstrated by the following interchange between the prosecuting attorney and the defendant in the above-mentioned manslaughter case:

> Q: You didn't tell us, Doctor, whether you determined that the baby was alive or dead, did you, Doctor?
> A: The fetus had no signs of life.

Danet found that the witness was most susceptible to semantic contagion when questioned about the specific operation at issue. This implies that resistance might have been greater if the witness had been specifically instructed on the use of certain words. The matter remains to be investigated.

Another piece of advice commonly offered to lawyers is to avoid the use of negative constructions in question formulation(22). In some cases, the use of a negative will create ambiguous questions. One of the most serious problems arising from the use of negative questions is that people have difficulty comprehending negative constructions. For example, when asked the following question, "So, there is no interview sheet, is that not correct?" a witness replied in the affirmative, meaning that there was a sheet(23). The attorney continued the cross-examination assuming there was none. This point was illustrated in a study of airline passengers presented with emergency landing instructions while waiting in an airport for a call to board their holiday flight(24). Subject-passengers who agreed to participate in the experiment were told to try to remember as much as possible about the emergency procedures, and that they would have five minutes following presentation of the instructions to write down all the details they could recall. The passage used was based closely on the actual instructions used by the airline. Some subjects were presented with statements phrased affirmatively while others were presented with negatively phrased statements. Compare "When using the slides, remove your shoes, straighten your legs, and place hands on knees" with "When using the slides, do not keep your shoes on, do not bend your legs, nor fail to place hands on knees." Performance was significantly worse when instructions were negatively phrased. These results are consistent with the earlier laboratory work of Mehler(25), who found that subjects who performed a rote-learning task recalled affirmative sentences better than negative sentences.

In a legal setting, when multiple negatives are used the problem becomes acute, as in "Wouldn't you agree that an innocent misrecollection is not uncommon(26)?" Confusing double questions containing multiple negatives are often generated when an attorney attempts to frame a closed-ended question, as is frequently advised for cross-examination, by appending a question tag to an existing question, as in "So you never left the city that day, is that not correct(27)?"

While there is evidence that all negative sentences take longer to process than affirmative sentences(28), and are more difficult to remember, some types of negative sentences are more difficult than others. For example, Vosniadou(29) found that subjects took longer to verify syntactic negative sentences, such as "She hasn't remembered" than semantic negative sentences, such as "She has forgotten."

Another important point in formulating questions is that when carefully structured, they can often contain pragmatic implications that are highly influential in causing jurors to draw intended inferences. A pragmatic implication is simply a remark that leads the hearer to expect something neither explicitly stated nor necessarily logically implied in a sentence. For example, the sentence "The fugitive was able to leave the country" leads people to think he left, but it doesn't say he left and he may not have. Similarly, the statement "The karate champion hit the cement block" pragmatically implies "The karate champion broke the cement block." The statement did not say anything about the cement block breaking, but people tend to infer that this happened, and later on they actually misremember the statement, thinking that they heard what was only inferred by them. Harris and his colleagues(30) have effectively shown the power of pragmatic implications in courtroom testimony. In one study, subject-jurors heard an excerpt of a mock courtroom testimony and were later asked to indicate whether particular statements were true, false, or indeterminate based upon that testimony. Statements of the sort "Mr. X rang the burglar alarm" were evaluated. Half of the subjects heard a given piece of information asserted directly as in "I rang the burglar alarm" while the other half heard the same information only pragmatically implied or suggested, as in "I ran up to the burglar alarm." Later on, subjects generally remembered implications as definite facts, even when specifically warned not to do so.

The tendency of observers to draw pragmatic implications from implicit suggestions in a sentence is not dependent upon any particular syntactical arrangement. This occurs whether the evidence is presented in question form or in the form of an assertion or denial. For example, researchers found that observers inferred guilt on the part of the agent, Maxwell, assuming he was guilty, when either the following question or negative construction was used: "Did Maxwell strike his teacher?"; "Maxwell did not strike his teacher(31)."

Why do pragmatic implications cause distortions in memory? Related research has demonstrated that if the existence of an active item is assumed in a question, subjects will be more likely to affirm the existence of that item when questioned directly about it at a later stage(32). Thus the earlier questions appear to alter memory. Questions that contain pragmatic implications may work in a similar manner. The implication causes a person to draw an inference that then becomes part of memory.

c. Strong beginning and end.

Almost without exception, attorneys are advised to start their case with a strong witness and to end with a strong witness(33). The same basic principle is advocated for the examination of each witness, on the theory that the jury will pay maximum attention at the beginning and end of each witness examination(34). More specifically, Oliphant(35), in writing about the advice of the well-known lawyer Irving Younger, recommends that examinations be ended on an "up-tick", and that the same procedure should be observed before the court adjourns for every recess. Furthermore, a weak witness should be positioned between two strong witnesses.

These theories are consistent with what psychologists have called "primacy and recency effects," based upon work in the areas of learning and memory. Classic work has shown that when people are given a list of items to remember, the items at the beginning and at the end of the list are remembered well, while items from the middle of the list are remembered poorly(36). The "primacy effect" is where the first few items have a greater chance of being remembered, and the "recency effect" is where the last few items have a greater chance of being remembered. Furthermore, there is the "serial position effect," which is the relationship between the moment when information is presented and how well that information is remembered.

While there has been extensive research on these phenomena by experimental psychologists, few studies have succeeded in adequately simulating the typical trial structure, in which the testimony of witnesses is alternately presented favorably, on direct-examination, and then subjected to critical scrutiny on cross-examination. Rather, the usual procedure involves presenting contrasting information in univalent blocks(37). As a consequence, it is unwise to generalize results from the laboratory to the courtroom. A second problem in applying these theories to trial practice is that a great many other variables may be confounded with the timing of the presentation of information - factors such as juror competence or the amount of time that passes between presentation of information and arrival at verdict. In some trials, several weeks may elapse between the time a witness testifies and the time when the jury begins deliberation. Even though deliberation typically follows immediately after jury instructions, in some cases jury instructions may take several hours to deliver. During these long intervals of time, jurors may forget either the information itself, or its source(38). What is more troubling to the lawyer who might follow the serial position advice are the negative results obtained by Padilla(39). In a carefully controlled study which simulated the courtroom sequence of presentation by including testimony in the style of direct and cross examination as well as closing arguments, this investigator found that no significant primacy or recency effects resulted when the order of information was varied.

Advice of a psycholinguistic nature is commonly offered to attorneys; however there is little substantive guidance in most trial manuals. Most of the advice is of a very simple nature, such as the advice to formulate simple, straightforward questions. Such advice is hard to dispute, and is generally supported by existing psychological data. However, in our view, the advice given could potentially be far more sophisticated than that which is now offered. For example, more careful attention to the framing of questions which either by their structure or their semantic content contain pragmatic implications might go a long way towards improving the effectiveness of a direct examination.

III. DIRECT EXAMINATION

a. The more complete and detailed the description, the more convincing.

Prosecutor Michael Ficaro(40) compared two ways a witness can be questioned about his morning activities: 1) "You say in describing your morning activities that you awoke from sleep and dressed," and 2) "You awoke, rolled over, swung both of your legs over the bed, put your weight on your right leg, then the left, lifted yourself off the bed, and walked to the dresser,. You then removed your pajama top, then bottoms, reached out with your left hand, opened the drawer..." The latter version by virtue of its completeness is considered more persuasive. He pointed out that this technique has a special advantage when questioning an eyewitness since an event that took place in a few seconds can "be made to seem like hours to the jury." If at this time the witness is asked to identify the defendant in court, the jury is more ready to believe in the accuracy of the indentification.

Is it generally the case that the more detailed description is better? Assuming that the examiner does not violate another piece of advice offered by Ficaro, namely "Don't supply too many details on peripheral matters," nor the umbrella advice "Don't be boring," this advice makes sense under one condition. If the detailed account is a more vivid account, we can relate this advice to a host of studies indicating the power of vivid information to persuade.

Vivid information reaches us in a way that nonvivid information cannot. One study of the power of vivid information was conducted in the context of a simulated legal trial(41). Subjects read testimony from a hypothetical trial of a man accused of drunk driving. Some subjects read pallid prosecution testimony and vivid, more detailed defense testimony, while others read vivid and detailed prosecution and pallid defense testimony. For example, one item of prosecution evidence was intended to establish that the defendant was drunk shortly before leaving a party to drive home. In the pallid version, the defendant staggered against a table, knocking a bowl to the floor. The vivid version of the item stated that his action knocked "a bowl of guacamole dip" to the floor "splattering guacamole all over the white shag carpet." Similarly, an item of defense evidence was designed to establish that the defendant had not been drunk. It described his ability to leap out of the way of an approaching "car" in the pallid version, or a "bright orange Volkswagen" in the vivid version.

Subjects had to recall information from the trial and then render a verdict. For subjects who rendered their verdict one day after the trial testimony, the power of vivid information was substantial. Those exposed to vivid prosecution testimony were more likely to render guilty verdicts, while those exposed to vivid defense testimony were more likely to acquit. Based upon these and other findings, Nisbett and Ross(42) concluded that "vivid information, that is, concrete, sensory, and personally relevant information, may have a disproportionate impact on beliefs and inferences(43)." On the contrary, pale and dull statistical information which is often a more accurate reflection of the truth, can be totally ignored. A leading explanation for the greater impact of vivid information is that it is better remembered, and thus it is more available to the subject-juror in reaching the verdict. Although some investigators have comforted us with the ideas that the power of vivid information is much weaker that Nisbett and Ross would have us believe(44), the potential for great influence still remains. One consequence of the vividness effect on advice for direct examination is that the more detailed and vivid account will be more persuasive.

Parkinson(45) found that successful prosecutors employed different speech styles from successful defense lawyers. He compared the speech patterns of each in 19 criminal cases, studying the correlation of linguistic strategy and trial outcome. Prosecutors who included detailed questions enjoyed an advantage over those who did not. On the other hand, successful defense attorneys tended to use fewer afferent words, and minimized the use of questions containing references to concepts sensed with the five senses. For defense lawyers, oddly enough, the more abstract and ambiguous the speech style, the better.

These remarks refer to the general persuasive impact of detailed information. However, an additional consequence of the detailed presentation, according to Ficaro, is the impression it gives of a longer-lasting event. This is particularly advantageous for a prosecutor who wishes to extend in the minds of jurors the apparent length of time an event lasted. On the surface this suggestion seems to warrant serious consideration, although we know of no data that directly bear on it. One study that bears indirectly is that of Parkinson(46) who found that prosecutors who were more verbally assertive, thus whose witness examinations lasted for a long time as a result of the greater number of questions posed to witnesses, were more successful. However, this finding has not been replicated.

b. Use loopback questions

Ficaro(47) warns lawyers that it is improper for an examiner to continually repeat the answers of the witness. However, an important point can be hammered home if prior answers are occasionally included in a question. This technique is referred to as "loopback questioning" or "backtracking," and entails forming a question by incorporating part or all of a witness' previous answer into a subsequent question. For example:

> Q: What happened next?
> A: I got into my car.
> Q: And after you got into your car, what did you do?

Loopback questions are recommended for a variety of reasons, including emphasis of a favorable answer or repetition of an important point(48). A loopback can provide some variation in the question format, make transitions in a line of questioning or conclude an examination. Kestler(49) noted that loopbacks are useful to regain control of a witness who is "slipping away", permitting the examiner to refer to a question which the witness answered favorably and to continue from there.

As a device to produce repetition of important points, loopback questions are undoubtedly a valuable technique. The importance of repetition for memory is so well documented that at least one textbook on human learning and memory devotes an entire chapter to the topic(50). Information which is repeated is more likely to be stored in jurors' memories, and thus increases the likelihood they will recall it during their review of the evidence during deliberation.

Whether the use of a loopback question will also increase the persuasive nature of a particular point is still an open question. We know of no experiment designed to test this hypothesis, although, a trial simulation study by Johnson and Watkins(51) on the "sleeper effect" has some bearing on this question(52). These investigators varied the number of times that certain testimony was repeated during a simulated trial to assess the effect on the beliefs of jurors. Intervals of up to four weeks between the presentation of evidence and the final belief measures were used. A major finding was that repetition made a significant difference in the case of a witness with high credibility, but not in the case of a witness with low credibility. What is especially interesting is the finding that the subject-jurors generally forgot the source of the information, i.e., they did not remember which party had introduced the evidence. The fact that the evidence was recalled at all after the longest intervals of time emphasizes the usefulness of repetition.

c. Raise unpleasant facts on direct.

Ficaro(53) warns lawyers that when their witnesses are vulnerable to attack from unfavorable facts, it is usually better to reveal these facts on direct examination. One's attitude toward this weakness should be matter-of-fact so as to suggest it has no adverse bearing on the value of the witness's testimony. If the lawyer acts positively, the jury is less likely to believe that any confidence in the witness is shaken. Of course, the unpleasant fact should not be revealed if opposing counsel is likely to be unaware of the fact. The advice to concede weaknesses that are readily apparent in the witness's testimony is so fundamental that some lawyers have called it "a cardinal rule of direct examination(54)." According to Kadish and Brofman, a sincere disclosure of the weaknesses will make the witness a "human being to the jury and will protect the witness from attack on cross-examination(55)."

When a lawyer raises a damaging fact on direct examination, does this have the effect of "innoculating" the jury against its ultimate exposure by an opposing party. In other words, can it immunize? One research paradigm that may be relevant is that used in traditional studies of attitude change. For example, in a study conducted well before the Russians had produced their first atomic bomb, subjects were given one and two-sided arguments in support of the view that the Russians would not be able to produce the bomb in the next five years(56). The two-sided argument also included a few opposing points, such as the fact that there were large uranium mines in Siberia. After hearing either the one-sided or the two-sided view, subjects heard a counter-argument to the effect that the Russians would produce the bomb in less than five years. The results were clear: subjects who first heard the two-sided argument were less persuaded by the counter-argument than were those who initially heard the one-sided argument. In his writing about innoculation, McGuire(57) has used a medical analogy. He argues that people develop many beliefs over their lives that are never seriously challenged. For example, we believe that we should brush our teeth twice a day, or that we should not go outside without a jacket if we have a cold. Just as a person builds up immunity to a disease (like smallpox) when given a small dose of the disease-causing germs (smallpox vaccination), so these cultural truisms will be more resistant to challenges if people are made aware of the arguments against them. In a more empirical vein, McGuire and Papageorgis(58) tested two methods for producing resistance in people to persuasive communication. Subjects read a cultural truism, followed by either supportive arguments or by a refutational defense (arguments against the truism followed by a defense against these arguments). Several days later, subjects received information attacking the cultural truism. Who was less persuaded by this attack? A refutational defense was clearly superior to a supportive defense in protectng the individual's beliefs against subsequent counterarguments.

Although the effects of innoculation may be clear in the attitude change studies, it must be kept in mind that the materials used in these studies are very different from the types of arguments that jurors hear in a courtroom. Two social psychologists have warned that "at the present time there is little evidence to support any generalization of innoculation effects to the more controversial opinions and issues that serve as the content of most persuasive communications in everyday life(59)." In other words, the attitude studies hint that innoculation may work, but it remains for further researchers to confirm the beneficial effects of this technique in a courtroom situation.

d. Call for an in-court identification at the beginning of the testimony.

While individual styles may lead lawyers to differ as to the most effective moment in the examination to call for the in-court identification of a suspect by a witness, Ficaro(60) advises prosecutors to do it early. This has an important psychological advantage, he argues. Once the witness has pointed out the defendant as the offender, the prosecutor may assume this fact in phrasing subsequent questions: "When did you first notice the defendant?" "What was the first thing that the defendant said to you?" "Where did the defendant point the gun?" This is calculated to produce in the jurors' minds a running picture of the defendant committing the crime, as opposed to their visualizing some "abstract, faceless assailant(61)."

Some interesting new psychological work suggests that causing people to imagine an event in a particular way will also lead them to think that the event is more likely(62). Imagining that a tornado will strike the coast of Florida, or that Ted Kennedy will win the next Presidential election, makes these events seem subjectively to be more likely. Imagining good things (like winning a contest), or bad things (like being arrested for armed robbery), makes us more likely to believe that these things could happen to us. Why does this occur? According to Anderson(63), in everyday natural settings we engage in imagination processes such as reflecting and ruminating. Decisions about what we or other people are likely to do are often made on the basis of how easy it is to imagine a sequence of actions occurring. When we create a scenario for all or part of the actions in a given situation, the sequence becomes more available in our minds. Put another way, because these mental images have already formed, upon any subsequent consideration they may be more readily pictured than before. Another possibility, however, is that the initial mental construction of an event happening in a particular way creates a cognitive "set" that impairs the ability to see the event in competing ways(64). Whatever the precise psychological mechanism that is responsible for the "imagining effect," these ideas lend support to Ficaro's advice.

Before leaving advice on examining the identification witness, we mention one interesting suggestion concerning the use of two occurrence witnesses. Ficaro(65) recommends placing the witness who sees, hears, or remembers less on the stand before the witness who can offer more detailed testimony. His reasoning: to avoid potential impeachment of one witness by information provided by the other. We know of no psychological studies that directly bear on this advice.

IV. CROSS-EXAMINATION

Cross-examination of a witness may accomplish a number of different purposes. The style and substance of the questions put to a witness will vary accordingly. In some instances, the witness' responses are crucial to the goal of the examination e.g., when the objective is to discredit a witness by revealing biases and prejudices, or to impeach a witness by exposing prior inconsistent statements. In other instances, the witness' response is considerably less vital. The witness merely provides a vehicle by means of which the attorney can testify in support of his or her case in chief. Thus, the objective is to elicit confessions from the witness which tend to corroborate or credit the opponent's case, thereby creating a record to which the attorney can refer in substantiation of arguments at the close of the trial.

No matter what the particular purpose of the cross-examination, success usually depends on the ability of the attorney to maintain control of the situation. Consequently, during cross-examination, attorneys concentrate on posing questions which can be answered in only one way by the witness on the stand. The question form is generally structured to restrict the opportunity for the witness to give extensive explanations in response.

a. Ask leading questions.

Typically, trial lawyers are advised to use broad open-ended questions for direct examination, and short closed-ended questions during cross-examination(66), taking advantage of the Federal Rules of Evidence, which permit the use of leading questions in the latter case. For example, in discussing cross-examination techniques, Hupy(67) explicitly states: "You should ask leading questions and suggest the answer you want whenever possible(68)." The rationale permitting leading questions is based on the theory that testing a witness' memory, veracity, and accuracy is facilitated by the narrow structure of the leading question(69).

How do we identify a leading question? Even experts would agree that the definition of a leading question is far from precise(70). The prevailing legal standard is found in U.S. v. Durhan, 319 F.2nd 590, 592 (1963) identifying a leading question as one which "so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory." Ogle, Parkman and Porter(71) point out that questions such as "Wasn't the car red?" or "The car was red, wasn't it?" are leading, whereas "Was the car red?" and "The car was red?" are not. However, because they argue that suggestion in questions may not be obvious to either the judge or the witness, research by psychologists and linguists may be useful in identifying other forms of leading questions. For example, questions requiring a "yes" or "no" response can be leading in certain contexts, or leading by virtue of the inclusion of suggestive details, i.e., "Was the getaway car a red 1978 Firebird with whitewalls and a pair of dice hanging from the rear-view mirror?"

Support for the view that the leading nature of a question cannot be found exclusively in the syntactical formula which the question follows comes from Dunstan(72), who advocates the consideration of other communication variables in the courtroom. He finds coercion not in the syntactic boundaries of the question, but rather in the ability of attorneys to use specific conversational rules of the courtroom to advantage, while a witness, unwittingly following normal social rules, is put at a distinct disadvantage. For example, in a normal social setting, when someone asks a question, he or she is often looking for information. By comparison, in the courtroom, the attorney usually knows the answers to the question he or she is posing. (Wellman quoted a successful cross-examiner who said "A lawyer should never ask a witness on cross-examination a question unless in the first place he knew what the answer would be, or in the second place he didn't care(73).") In the courtroom, requests for information are in fact commands which the witness cannot disobey. Conventions to avoid embarrassment and humiliation do not apply. Normal turn-taking rules of conversation are inoperant, for the attorney controls the conversation and also the pauses between conversation. In short, the conversational rules of the courtroom coerce the witness regardless of the syntax of the questions. This analysis suggests that we might profitably keep the rules of the courtroom in mind when deciding whether or not a question is leading.

Whatever the precise definition of a leading question, our concern here is with the impact of such questions on jurors. In an experiment by Wells, Ferguson and Lindsay(74) subject-jurors observed witnesses who were examined by means of either leading or non-leading questions. Leading questions were characterized by the occasional assertion of a false premise, and by efforts to elicit contradictions and short responses. For example, the question, "The person you saw had a jacket, didn't she?" was later followed by "Was the jacket she had on tan or brown?" when, in fact, the suspect had not been wearing a jacket. Non-leading questions included no false premises, and were largely open-ended in nature, for example, "Describe what the person was wearing." Irrespective of witness accuracy, there was a slight trend of diminished witness credibility in the leading question condition (73% versus 81% belief). However, when the data were broken down by witness accuracy, inaccurate witnesses were more credible when non-leading questions were used, while accurate witnesses were more credible when leading questions were used.

A sophisticated theoretical analysis of leading questions had been postulated by Swann, Giuliano and Wegner(75). They hypothesized that observers such as jurors would use their knowledge of conversational rules to infer that an examiner has an evidentiary basis to include certain information in leading questions. Then, jurors accept the validity of the premises which are assumed in the question. Having accepted the underlying premises, the observers may go further and make appropriate inferences about the respondent. In this way, premises embedded in leading questions may quickly become foregone conclusions in the minds of jurors. Support for these hypotheses was provided in two studies in which some observers heard questions that suggested a person was an extrovert (e.g., "What would you do if you wanted to liven things up at a party?" or "In what situations are you most talkative?"). Other observers heard questions suggesting that the respondent was an introvert (e.g., "In what situations do you wish you could be more outgoing?" and "Tell me about sometime when you felt left out from some social group?"). Subsequently, the observers had to rate the person on a number of bipolar scales (extrovert-introvert, talkative-quiet). The leading questions biased the ratings. Swann et al. concluded that the underlying premises in the leading questions were treated as conjectural evidence by the observers in forming impressions of the respondents. Even when the observers were told that the questions were randomly selected, their impressions of the respondents were still swayed by the presuppositions in the questions. These results suggest that the presuppositions contained in leading questions can attain legitimacy in the minds of jurors, and induce them to misperceive the witnesses. This may be precisely what is intended by many cross-examiners.

b. Elicit "yes" or "no" answers.

In almost any trial manual that addresses cross-examination, tacticians will advise attorneys to ask questions that elicit "yes" or "no" answers(76). Among the most obvious reasons for this is the fact that the witnesses can be prevented from providing unanticipated answers if possible responses are limited(77). Furthermore, cross-examination can often be a rehabilitative process. That is, in trying to repair or undo any damage created by the direct examination, an attorney does not want to provide the witness with any further opportunity to damage the case(78). Confining the witness' responses then, can not only protect the case from further damage, but can also develop the equally important goal of discrediting the witness(79).

In discussing the use of questions which elicit "yes" or "no" answers, Kearsley analyzed the various functions these questions serve(80). He noted that the "evaluative" function of questions is to "establish the addressee's knowledge of the answer(81)." This application is appropriate in a legal context, especially during cross-examination. Presumably, cross-examiners will know the majority of the answers to the questions they ask. Furthermore, as Danet noted, the legal process is such that the opposing attorneys each present their views of a case indirectly(82) via witness testimony(83). Hence, the control of a witness is crucial in eliciting brief answers, for lawyers can assert their views of the case in their own words through the questions that they ask.

A special form of a yes/no question, called the "tag question," is useful in eliciting agreement. In an analysis of tag questions, Loftus(84) explained how agreement is generally obtained. In her experiment, subjects watched one of two versions of a film. One contained a bicycle and the other did not. After viewing the film, half of the subjects received the question: "Did you see a bicycle?" The other half received the question: "You did see a bicycle, didn't you?" The findings confirmed that tag questions do produce more "yes" answers than other questions - irrespective of whether the bicycle was actually present. Loftus noted that the tag functions by expressing the likelihood that the subject of the question exists. She concluded that when a person is asked about a recollection in a tag question form it is implied that the speaker expects a certain response. As this experiment indicated, it is most probable that the speaker will receive the expected response.

The effects of limiting a witness' response during cross-examination to "yes" or "no" answers were investigated by O'Barr and his colleagues in a series of studies of language in the courtroom(85). They have shown that certain linguistic styles can be more (or less) influential on listeners. They have isolated various styles of speech that affect listeners' perceptions of witness credibility. Of the various styles examined, the fragmented (brief answers) as opposed to narrative (lengthy answers) delivery styles are of special interest here.

The researchers began with actual trial testimony from which they isolated portions that featured the various speech characteristics under study. They asked actors and actresses to portray lawyers and witnesses and to reproduce the selected portions on audio tape. Subjects were chosen to participate as "jurors," and were divided into two groups, one of which heard the recorded testimony that included a specific linguistic feature, while the other heard a version identical in substance but which neutralized the feature under study. Finally, all "jurors" filled out a questionnaire designed to evaluate both the witness and the lawyer. The researchers predicted that the narrative style of presentation would be more influential upon the "jurors" than the fragmented style(86). This hypothesis was confirmed. The major effect, however, was the fact that the subject-jurors tended to evaluate a witness in terms of how they felt the lawyer was evaluating a witness(87). The subjects' impressions were that if the lawyer constrained the witness by asking many questions that called for only brief answers (as opposed to asking few questions that allowed for expansive answers) he must have had little faith in that witness. In short, when a lawyer exerted tight reign over a witness, the "jurors" perceived that witness as less competent, less intelligent and less assertive(88). Taking things one step further, it is reasonable to equate assertiveness with confidence. The extensive literature available on witness confidence concludes that jurors tend to believe a confident witness more than a witness who lacks confidence(89). If a fragmented style of testimony impresses the jury with the fact that a witness is less assertive (as well as less competent and less intelligent),(90) this tends to support advice to elicit "yes" or "no" answers from witnesses.

In general, advice to elicit "yes" or "no" answers is supported by the the psychological literature. In fact, as we have seen, this trial technique can accomplish far more than simply protecting a lawyer's case from unexpected answers during cross-examination.

c. Elicit "I don't recall" answers.

Ficaro advised: "The more times you can get [a] defendant to say, 'I don't recall, I don't know, I can't remember,' the closer you are to conviction(91)." Although this statement refers specifically to criminal trials, there is no reason why this advice cannot apply to civil litigation as well.

In discussing properties of courtroom questions, Dunstan provides some insight into the practical application of this advice(92). He illustrated how the fact that a witness strives to appear consistent can be used advantageously by lawyers. In the following example, Dunstan described how an attorney elicited a response from a witness who agreed to a vague description that an evening was quite warm. Then, the attorney focused on the issue of how warm it was:

> Q: ...and...you rolled down the window of your car...
> A: [It] was rolled down
>
> Q: ...[it] was a warm evening?
> A: Yeah.
> Q: ...'bout how warm was it? [Do you] remember?
> A: No, I don't.
> Q: Seventies? Eighties?
> A: I don't remember!

Once the witness had responded by committing herself to the position that she did not know how warm it was, when the question was repeated, she reemphasized that she did not remember the temperature. Dunstan argued that if the witness followed her first "I don't know" by conceding that the temperature was in the seventies or eighties, she would seem inconsistent and unreliable. Thus, the witness elected to appear consistent at the expense of appearing unreasonable. Despite the fact that "quite warm" and "seventies or eighties" are close in meaning, the witness appears unreasonable when she repeats "I don't know."

Attorneys who exploit a witness' desire to appear consistent by structuring cross-examination questions to elicit "I don't know" answers may diminish the witness' credibility. The more frequently a witness replies "I don't know" the more unreasonable the response becomes. In this respect, Ficaro's advice is supported.

However, lawyers may be interested in recent psychological findings which tend to contradict a belief commonly held by many jurors. Many jurors believe that an eyewitness who can supply many details observed at the scene of a crime must be more reliable than an eyewitness whose memory for trivial details is poor. In a study in which accurate and inaccurate eyewitnesses were cross-examined on their ability to recollect eleven details peripheral to the scene of the crime, witnesses who identified an innocent person as the thief recalled 8.5 items, whereas witnesses who identified the true culprit recalled an average of 6.36 items(93). Subject-jurors who viewed videotapes of the trivial details cross-examination were more readily persuaded by inaccurate than accurate eyewitnesses (58.3% versus 37.5%). Thus, a witness who frequently answers "I don't know" may in fact have accurately identified the suspect. In light of these findings, lawyers may wish to submit a special cautionary instruction to jurors to note that there is not necessarily a positive correlation between accurate identification and memory for peripheral details.

V. CONCLUSION

Advice to the trial lawyer on how best to conduct a direct or cross-examination is freely offered. Some of this advice finds support in the existing psychological literature. While it is difficult to isolate a piece of advice that is blatantly erroneous, it is common to find examples for which there is no empirical justification. Moreover, in many instances the proffered advice is extremely simplistic. Based upon existing empirical evidence, far more sophisticated suggestions could profitably be made and followed.

VI. REFERENCES

Elizabeth F. Loftus is a Professor of Psychology at the University of Washington.
Jane Goodman is graduate of the University of Puget Sound School of Law and a Doctoral Candidate in Educational Psychology at the University of Washington.
Chris Nagatkin is an undergraduate in Sociology at the University of Washington.

(1) Francis L. Wellman, *The Art of Cross-Examination*, 2nd ed. (1903; rpt. New York: Coller, 1936).

(2) F. Lee Bailey and Henry B. Rothblatt, *Successful Techniques for Criminal Trials* (Rochester: Lawyers Cooperative Publishing Co., 1971).

(3) Michael Ficaro, "Prosecution of Violent Crimes," Lecture presented in a seminar to the National College of District Attorneys, Colorado Springs, 1982.

(4) J. E. Norton, ed., *The Anatomy of a Personal Injury Lawsuit* (Washington, D.C.: Association of Trial Lawyers, 1981).

(5) Robert E. Oliphant, ed., *Trial Techniques with Irving Younger* (Minneapolis: National Practice Institute, 1978).

(6) Gary L. Wells, R. C. L. Lindsay, and Tamara J. Ferguson, "Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification," *Journal of Applied Psychology*, 64 (1979), 440-448.

(7) William Labov, "Objectivity and Commitment in Linguistic Science: The case of the Black English Trial in Ann Arbor," *Languages in Society*, 11 (1982), 165-201.

(8) Wallace E. Lambert, "The Social Psychology of Language: A Perspective for the 1980s," *Focus*, 5 (February 1981), 1-8.

(9) H. Giles and P. F. Powesland, *Speech Style and Social Evaluation* (New York: Academic Press, 1975).

(10) Michael Parkinson, "Language Behavior and Courtroom Success," Paper presented at the International Conference on Language and Social Psychology, University of Bristol, England, 16-20 July 1979.

(11) John M. Conley, William M. O'Barr, and E. Allan Lind, "The Power of Language: Presentational Style in the Courtroom," *Duke Law Journal*, 6 (January 1978), 1375-1399.

(12) William M. O'Barr, "The Language of the Law," in *Language in the U.S.A.*, eds. C. A. Ferguson and S. B. Heath (New York: Cambridge University Press, 1981), 386-406.

(13) Martha Platt, "Language and Speakers in the Courtroom," in *Proceedings of the Fourth Annual Meeting of the Berkeley Linguistics Society*, eds. J. J. Jaeger et al. (Berkeley: Berkeley Linguistics Society, 1978), 617-627.

(14) Conley, O'Barr, and Lind, see note 11.

(15) Platt, see note 13.

(16) Thomas A. Mauet, *Fundamentals of Trial Techniques* (Boston: Little-Brown, 1980).

(17) Conley, O'Barr, and Lind, see note 11.

(18) Ficaro, see note 3, p.4. Bailey and Rothblatt, see note 2. Mauet, see note 16.

(19) Robert P. Charrow and Veda Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," *Columbia Law Review*, 79 (1979), 1306.

(20) Mauet, see note 16.

(21) Brenda Danet, "'Baby' or 'Fetus'?: Language and the Construction of Reality in a Manslaughter Trial," *Semiotica*, 32 (1980), 187-219.

(22) Jeffrey L. Kestler, *Questioning Techniques and Tactics* (New York: McGraw-Hill, 1982).

(23) John F. Grady, "From the Bench," *Litigation*, 6 (1979), 62-63.

(24) S. E. File and A. Jew, "Syntax and the Recall of Instructions in a Realistic Situation," *British Journal of Psychology*, 64 (1973), 65-70.

(25) J. Mehler, "Some Effects of Grammatical Transformations on the Recall of English Sentences," *Journal of Verbal Learning and Verbal Behavior*, 2 (1963), 346-351.

(26) Charrow and Charrow, see note 19.

(27) Grady, see note 23.

(28) P. Wason, "Response to Affirmative and Negative Statements," *British Journal of Psychology*, 52 (1961), 133-142.

(29) Stella Vosniadou, "Drawing Inferences from Semantically Positive and Negative Implicative Predicates," *Journal of Psycholinguistic Research*, 11 (1982), 77-93.

(30) Richard J. Harris and Gregory E. Monaco, "The Psychology of Pragmatic Implication: Information Processing Between the Lines," *Journal of Experimental Psychology: General*, 107 (1978), 1-22.

R. J. Harris, R. R. Teske, and M. J. Ginns, "Memory for Pragmatic Implications from Courtroom Testimony," *Bulletin of the Psychonomic Society*, 6 (1975), 494-496.

(31) D. A. Wegner, R. Wenclaff, R. M. Kerker, and A. E. Beattie, "Incrimination Through Innuendo: Can Media Questions Become Public Answers?" *Journal of Personality and Social Psychology*, 40 (1981), 822-832.

(32) Elizabeth F. Loftus, *Eyewitness Testimony* (Cambridge: Harvard University Press, 1979).

(33) Gary Bellow and Bea Moulton, *The Lawyering Process: Preparing and Presenting the Case* (Mineola: Foundation Press, 1981).

(34) Bellow and Moulton, see note 33, p. 325.

(35) Oliphant, see note 5.

(36) A. D. Baddeley, *The Psychology of Memory* (New York: Basic Books, 1976).

Elizabeth F. Loftus, *Memory* (Reading, Mass: Addison-Wesley, 1980).

(37) Eligio R. Padilla, "The Effects of Order of Presentation and Cognitive Complexity on the Decisions and Perceptions of Simulated Jurors," Diss. University of Washington 1974.

(38) Litigation Sciences, "Witness Credibility: An Application of Psychological Data," *For the Defense*, 23 (Oct. 1981), 18-20.

(39) Padilla, see note 37.

(40) Ficaro, see note 3, p. 8.

(41) R. M. Reyes, W. C. Thompson, and G. H. Bower, "Judgmental Biases Resulting from Differing Availabilities of Arguments," *Journal of Personality and Social Psychology*, 39 (1980), 2-12.

(42) R. Nisbett and L. Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (Englewood Cliffs: Prentice Hall, 1980).

(43) Nisbett and Ross, see note 42, p. 190.

(44) S. E. Taylor and S. C. Thompson, "Stalking the Elusive 'Vividness' Effect," *Psychological Review*, 89 (1982), 155-181.

(45) Parkinson, see note 10.

(46) Parkinson, see note 10.

(47) Ficaro, see note 3, p. 6.

(48) Mauet, see note 16.

(49) Kestler, see note 22.

(50) Robert G. Crowder, *Principles of Learning and Memory* (Hillsdale, NJ: Erlbaum, 1976).

(51) H. H. Johnson and T. A. Watkins, "The Effects of Message Repetitions on Immediate and Delayed Attitude Change," *Psychonomic Society*, 22 (1971), 101-103.

(52) Litigation Sciences, see note 38.

(53) Ficaro, see note 3, p. 6-7.

(54) M. J. Kadish and R. A. Brofman, "Direct Examination Techniques for the Criminal Defense Attorney," *Trial Diplomacy Journal*, 3 (1980), 41.

(55) Kadish and Brofman, see note 54, p. 10.

(56) A. A. Lumsdaine and I. L. Janis, "Resistance to 'Counterpropaganda' Produced by One-Sided and Two-Sided 'Propaganda' Presentations," *Public Opinion Quarterly*, 17 (1953), 311-318.

(57) William J. McGuire, "Inducing Resistance to Persuasion: Some Contemporary Approaches," in *Advances in Experimental Social Psychology*, ed. L. Berkowitz (New York: Academic Press, 1964), I.

(58) W. J. McGuire and D. Papageorgis, "The Relative Efficacy of Various Types of Prior-Belief Defense in Producing Immunity Against Persuasion," *Journal of Abnormal and Social Psychology*, 2 (1963), 346-351.

(59) J. T. Tedeschi and L. Svenn, *Social Psychology* (New York: Wiley, 1976).

(60) Ficaro, see note 3, p. 7.

(61) Ficaro, see note 3, p. 11.

(62) John C. Carroll, "The Effect of Imagining an Event on Expectations for the Event: An Interpretation in Terms of the Availability Heuristic," Journal of Experimental Social Psychology, 14, (1978), 88-96.

W. L. Gregory, R. B. Cialdini, K. M. Carpenter, "Self Relevant Scenarious as Mediators of Likelihood Estimates and Compliance: Does Imagining make it So?", Journal of Personality and Social Psychology, 43 (1982), 89-99.

(63) Craig Anderson, "Imagination and Expectation: The Effect of Imagining Behavioral Scripts on Personal Intentions," Journal of Personality and Social Psychology, (1983), in press.

(64) Gregory, Cialdini, and Carpenter, see note 62.

(65) Ficaro, see note 3, p. 7.

(66) Mauet, see note 16.

(67) Michael F. Hupy, "Preparation for and Cross-Examination of Identification Witnesses at Trial," Wisconsin Bar Bulletin, (June 1982), 14-17.

(68) Hupy, see note 67, p. 17.

(69) James Marshall, Law and Psychology in Conflict, 2nd ed. (Indianapolis: The Bobbs-Merrill Co. Inc., 1980), 34.

(70) Marshall, see note 69, p. 34.

(71) Richard Ogle, Allen Parkman, and James Porter, "Questions: Leading and Otherwise," The Judges Journal, 19 (1980), 42-45.

(72) Robert Dunstan, "Context for Coercion: Analyzing Properties of Courtroom 'Questions'," British Journal of Law and Social Psychology, 7 (1980), 61-77.

(73) Wellman, see note 1, p. 43.

(74) Wells, Lindsay, and Ferguson, see note 6.

(75) W. B. Swann, T. Giuliano, and D. M. Wegner, "Where Leading Questions Can Lead: The Power of Conjecture In Social Interaction," Journal of Personality and Social Psychology, 42 (1982), 1025-1035.

(76) Ficaro, see note 3, p. 16. Kestler, see note 22, p. 59.

(77) Ficaro, see note 3, p. 16.

(78) Oliphant, see note 5, p. 50.

(79) Kestler, see note 22.

(80) Greg P. Kearsley, "Questions and Question Asking in Verbal Discourse: A Cross-Disciplinary Review," *Journal of Psycholinguistic Research*, 5 (1976), 360.

(81) Kearsley, see note 80, p. 360-361.

(82) Brenda Danet, Kenneth B. Hoffman, Nicole C. Kermish, H. Jeffrey Rafn, and Deborah G. Stayman, "An Ethnography of Questioning in the Courtroom," in *Language Use and the Uses of Language*, eds. Roger W. Shuy and Anna Shnukal (Washington, D.C.: Georgetown University Press, 1980), 222-234.

(83) Danet, Hoffman, Kermish, Rafn, and Stayman, see note 82.

(84) Elizabeth F. Loftus, "Language and Memories in the Judicial System," in *Language Use and the Uses of Language*, eds. Roger W. Shuy and Anna Shnukal (Washington, D.C.: Georgetown University Press, 1980), 257-268.

(85) Conley, O'Barr, and Lind, see note 11.

(86) Conley, O'Barr, and Lind, see note 11.

(87) Marilyn R. Abbey and William M. O'Barr, "Law and Language: The Duke University Studies," *Trial Diplomacy Journal*, (Winter, 1981), 26-29.

(88) Conley, O'Barr, and Lind, see note 11.

(89) Loftus, see note 32, p. 19.

(90) Conley and O'Barr, see note 11.

(91) Ficaro, see note 3, p. 21.

(92) Dunstan, see note 72.

(93) Gary L. Wells and Michael R. Lieppe, "How do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can be Misleading," *Journal of Applied Psychology*, (1981), 682-687.

FROM THE LEGAL PROFESSION: LEGAL STRATEGIES AND RESEARCH NEEDS IN DIRECT AND CROSS EXAMINATION

Francis E. McGovern

James H. Davis

The bulk of the trial of a lawsuit is consumed with the presentation of evidence through the questioning of witnesses and the introduction of documents and other physical material. Regardless of assumptions concerning the goals of a trial - "truth" finding[1] or dispute resolution[2] - it is important that facts are communicated effectively and that decisionmakers are given the information necessary to make informed judgments. Yet we have little empirical evidence concerning the best methods of accomplishing these goals. Experienced trial lawyers commonly opine on how best to talk with jurors or speculate on how jurors assimulate information and form opinions.[3] Law review and bar association journal articles are usually written on narrowly defined topics without empirical substantiation.[4] These commentaries tend to overlook the dynamics of direct and cross examination and the various competing methods of communication that are occurring while testimony is being given. This paper endeavors to describe in general terms the direct and cross examination process and to suggest possible avenues of empirical research that may enhance our understanding of these processes.

Overview of the Trial Process

Adversarial System

The American legal system is adversarial in nature; in its simplest terms, opposing parties present their facts and arguments to an impartial third-party for resolution. The onus is on each side to protect its own interests by submitting convincing evidence or by discrediting the opponent's presentation. The interjection of data by other parties is either absolutely curtailed or extremely limited.[5]

The role of the decisionmaker has typically been considered passive - a receiver of messages or an umpire. This assignment of role is found in both criminal and civil trials and with both judges and juries. Unlike the inquisitorial system of justice, the judge does not represent the state or the public's interest.[6] Typically in a jury trial a judge will feel compelled to restrict his involvement to a decisionmakers on issues of law presented by the parties and to a neutral observer on issues of fact presented to a jury.[7] While a grand jury actively participates in the investigation a matter, a petit jury seldom has an opportunity to ask questions or make comments.[8]

In some kinds of trials there is a deemphasis of the adversarial mode of proceeding. For example, in juvenile proceedings formalistic rules tend to give way to the state's interest in protecting the child.[9] The procedures adopted for small claims courts simplify the manner in which each side conveys a story and allow for increased participation by the bench.[10]

The personality of the judge may effect the extent to which the trial is adversarial. Some jurists quite readily accept the umpiral role and only interject themselves when requested or required.[11] Other judges see themselves as case managers with a responsibility for seeing that proceedings are conducted in accordance with their concepts of correctness and efficiency.[12] Trials in federal or state court may also vary with the former typically more formal containing more restrictions in the freedom of attorneys to act.[13]

Stages of a Trial

A trial can be separated into several stages, each with distinct purposes and a variety of opportunities and methods of communication. Although the legal system treats each phase as a distinct event with distinguishable functions,[14] the lines of demarcation are shadowy with several forms of communication occurring in each stage. For example, during the voir dire of prospective jurors, counsel will often attempt to interject bias or to heighten the jurors' awareness of specific evidence.[15] Despite instructions by the judge that an attorney's statements are not to be considered as evidence, jurors may be unable to separate a lawyer's description of forthcoming testimony and interpretation of that testimony from the actual testimony when it is actually introduced into evidence.[16] In a jury trial, the order is as follows: pre-trial; jury selection; opening statements; presentation of evidence; closing arguments; and jury instructions. When case is heard by a judge alone, there is no need for jury selection or jury instructions.[17] The pre-trial phase is designed to allow for the gathering of information and the narrowing of contested issues. Opposing counsel communicate with one another;[18] witnesses may be examined;[19] and the judge is informed about the development of the case.[20]

Throughout the trial, the participants are attempting to transmit information to a variety of targets by a variety of mechanisms. During the pre-trial, the attorneys are informing the judge of facts that may influence his rulings on legal objections and motions.[21] In addition, some factual matters are determined with finality at the pre-trial stage. A party may admit a fact;[22] some issues may be resolved by use of summary judgment or other pretrial motions;[23] or a party may be precluded from contesting a fact during the trial because of a legal ruling.[24] Although opening and closing statements are generally restricted to the presentation of facts that will be or have been introduced into evidence, attorneys will attempt to interject additional factual information. For example, prosecutors often speak on crime waves and the need to send a message to the public without introducing any evidence to support these assertions.

Order of Examination

Within the testimony phase of a trial, there is an established order of proceeding: plaintiff's (state's) case-in-chief; defendant's cross-examination; defendant's case-in-chief; plaintiff's (state's) cross-examination; and rebuttal.[25] As with virtually every aspect of the legal system, there are exceptions to this order of presentation. The plaintiff may call the defendant or one of his or her witnesses as an adverse witness.[26] The unavailability of a specific witness may require an alteration in a schedule. There also may be restrictions on the type of testimony which may be heard during these individual phases of evidence presentation. In some jurisdictions, cross-examination is limited to subjects raised in the case-in-chief[27] and rebuttal is allowed only to specific issues.[28]

Question and Answer Format

As a general practice the fact finder in a trial learns of information through a witness's responses to questions posed by attorneys.[29] This mode of evidence presentation is often cumbersome and time consuming. To introduce into the record of a case a piece of physical evidence could require the questioning of several persons on trivial matters.[30] In a criminal trial, the investigating officer may not be able to introduce an item of tangible evidence without the supporting testimony of the individual who found the object, the persons in whose custody the item had been, and anyone who might have tested it.[31]

There are other limitations on the method of using a question and answer format. In direct examination, an attorney is not permitted to ask "leading" questions which suggest an answer to a question.[32] Similarly, there are limitations on the kinds of responses that may be given.[33] The answer must be related to the question and cannot contain information which is otherwise inadmissible.[34]

Restraints Imposed by the Judicial System

Along with the contraints found in the adversarial process, in the order of presentation at trial, and in the method of presenting evidence, there are other system restraints. Some are dictated by formal rules and others are enforced through informal rules.

Rules of Evidence

Courts and legislatures have developed rules of evidence that prohibit or limit the introduction of certain forms of evidence.[35] These rules vary from jurisdiction to jurisdiction[36] and are subjected to continuing revision.[37] Similar restrictions are not placed on other governmental decision makers such as legislative and administrative bodies. In this paper, it is impossible to delineate the logic underlying any specific rule of evidence. For present purposes it can be assumed that determinations have been made that certain kinds of testimony or evidence are untrustworthy or subject to misuse. Many of these determinations await empirical verification.

A witness must testify as to events of which he or she has first-hand knowledge and is not permitted to relate conversations with third parties.[38] A scientist can testify as to his or her own research but may be limited in informing the jury of the studies of other scientists.[39] Rules of evidence require that a witness's answers be material[40] and relevant[41] to the issues and responsive to the questions.[42] Specialized rules have been devised for expert witnesses that allow for more freedom in giving opinion testimony.[43]

The introduction of documents and physical items for consideration by the fact-finder are also subject to rules of evidence.[44] For example, a hospital patient's medical chart must have been maintained in accordance with an established procedure in order to be admissible.[45] A current topic in the legal community is the admissibility of computer-generated information.[46] The utility of being able to analyze large amounts of data is often weighed against the validity of the source of the data in judicial considerations of admissibility.

Additional evidentiary concerns are raised by the use of demonstrative evidence. What role can be played by in-court experiments? A judge may require that an experiment be absolutely identical to the events surrounding the actual incident that is being examined.[47] Charts and diagrams prepared prior to trial by professionals may not be used unless a witness can testify as to their accuracy.[48] Summaries of the testimony may be prohibited even in complex litigation.[49]

Rules of Procedure

As with the evidentary rules, courts, through their inherent authority or in conjunction with legislative bodies, have promulgated sets of rules that govern the trial procedures to be followed.[50] While the limitations imposed by the procedural rules may have less obvious impact than the evidentary rules, they do have influence on the communication of information.

Some examples of the effects of trial procedures upon the communication process are suggested below. If a potential witness is unwilling to testify, a party's only resort may be to the court's subpoena power which is limited under the procedural rules.[51] While an individual may be deposed prior to trial, there are restrictions on the use of the deposition during the trial.[52]

In jury trials, the rules allow the judge to restrict the jury's actions[53] and even to keep an entire matter or portions of a case from a jury's consideration.[54] An attorney must always be aware of these powers of the court and thus direct attention to the role of both legal and factual decisionmakers. Judges may alter the format of the routine trial. For example, a trial may be severed into separate "mini" trials.[55] In a personal injury suit bifuracted into liability and damage trials, the extent of the injuries suffered by the plaintiff will not be communicated through the witnesses when the only issue is the defendant's liability.[56]

Individual courts or jurisdictions have the authority to establish local procedural rules that may also affect the flow of information.[57] In the Philadelphia area, for example, state judges have employed procedures which may speed up the processing of claims but change the manner inwhich the advocate can operate.[58]

Rules of Professional Conduct

Standards of professional ethics also limit the behavior of attorneys.[59] Although severe breaches of the standards are unusual and drawing distinctions under the nebulously worded ethical rules may be difficult,[60] bar associations, through the courts, enforce these disciplinary rules. The mere presence of these rules may force trial lawyers to be cautious than would ordinarily be expected. Just as important in insuring compliance with formal or informal ethical standards may be the role of continuing relationships among members of the bar and unstated but realistic mechanisms for enforcement of professional conduct.

The trial judges may also have preferences that influence how a lawyer may communicate to others. Repetitive testimony may not be presented to a jury for fear of creating a hostile response from the bench. Attorneys quickly learn how to avoid a judge's disfavor. Federal judges are generally considered more formal and allow less freedom of action than state judges. As an example, in some federal courts attorneys must speak from a podium instead of approaching the witness or the jurors.

Functions of Testimony

There are as many functions of the presentation of testimony as inventive minds can create. The following discussion illustrates some of these functions. A major reason for questioning witnesses is to convey raw information to the factual decisionmaker. A party must raise enough factual issues to create a factual dispute or the case will be subject to a directed verdict or other form of dismissal.[61] Having created a contested factual issue, the attorney then often attempts to introduce data to support favorable conclusions concerning the significance or meaning of the presented facts. The question and answer format lends itself to the soliciting of such factual information. For example, a witness will recount his or her remeberance of a specific occurance.

The introduction of purely factual information into evidence is not the only object of the questioning process. Experienced trial lawyers also use cross and direct examination as part of their persuasive techniques. The judge and jurors are assigned the task of weighing a witness' statements as to credibility and accuracy,[62] and examination of a witness may be devoted to enhancing creditability or creating distrust. For example, when identification of a person or object is at issue, inquiries will be made about the witness' physical abilities to remember.[63] The bias of a witness may be explored; a person's pecunary interest in the outcome of the trial may be useful information to the decisionmakers.[64]

Direct and cross examination of witnesses may present opportunities for developing feelings of dislike or compassion toward parties in a case. A witness' hostility toward a questioner may have as much influence on the jury as his or her answers. In personal injury suits, the plaintiff's counsel will often endeavor to depict a client's plight while the defense may feel the need not to be harsh in examining a victim to avoid the appearance of being insensitive.[65] Accusations of "play acting" may be made concerning the presentation of a case, but this behavior may serve an important function in the operation of the judicial system.[66]

In some circumstances, the object of the examination is to distort the facts of a case or even to present misinformation. This is especially true in jury trials where a non-decision can be considered a victory.[67] The creation of confusion may be as beneficial as providing factual information. For example, a trial lawyer may endeavor to distract the jury's attention or cloud their minds with a surplus of facts.[68] Introducing misinformation may be useful particularly if the testimony may not be countered by an opponent.[69]

Participants and Their Roles

The examination of witnesses involves multiple participants, and each participant may have different roles and functions in the trial process:

Attorneys

From one prespective lawyers are paid professionals who merely organize the presentation of pretrial evidence at trial and assume the role of advocate at the closing argument. In reality, the function of the trial lawyer is significantly more than that. Indeed, the role of the trial lawyer may vary from case to case and attorney to attorney. It is important to recognize that the assumed role - be it of achieving victory at trial, satisfying a client's overall needs and desires apart from the outcome of the case, or of acting in the capacity as an officer of the court - may be crucial in an analysis of the trial process. Although there may be conflicting roles that can be assumed, the trial lawyer typically will attempt to enhance credibility by developing the trust of the decision maker.[70]

As with any group of individuals, the skill of lawyers vary. Some people should not try lawsuits.[71] Even among trial lawyers, some individuals may be more effective before a judge than a jury or in one type of trial than another. Research concerning "how-to-do-it" hints should take into account these differences.

Judges

Judges have the potential for both passive and active roles during the course of a trial. In a jury trial the judge is an impartial decisionmaker. As the umpire, he or she rules on motions which may limit the introduction of evidence. For example, the bench's interpretation of materiality or relevancy can vary or the rules of evidence may be used to control the flow of information.[72] The judge determines if a party's presentation meets the established legal standards concerning sufficiency of evidence.[73] In non-jury trials, the judge also makes the factual determinations.[74]

The judge can play an active role. He or she has the authority to determine certain kinds of facts[75] or to question witnesses.[76] There is also the power to call witnesses, especially independant experts.[77] Additionally, the judge is free to make comments to the jurors. Such communications may be formal, as with instructions,[78] or informal through responses to events happening during a trial.[79]

Participation by the judge is not unrestricted. While appellate courts permit the trial judge to have a great deal of discretion, this power can be abused, and subject the proceedings to a retrial.[80] Like the ethical considerations placed on lawyers, judges must abide by ethical and legal rules of behavior.[81]

The personalities and abilities of judges differ and these variations may influence the communication of information. A judge who assumes a strong case-manager role will operate differently from one who opts to be an umpire. Judges are appointed[82] or elected[83] to the bench from differing experiences. Their familarity with the trial process might be correspondingly limited creating problems in variability for the researcher.[84]

Jurors

As a general proposition, the jury is very limited in its participation in a trial until the beginning of its deliberations at the end of the presentation of testimony and arguments. They receive the information that others present. Seldom can a juror ask a question of a witness.[85] Should a juror visit a scene or conduct an experiment, there may be a mistrial.[86] In addition, the jurors are instructed not to discuss the case with other people and to restrict outside imput to their own common sense.[87]

Unlike the judge, the decisions to be made by the jury concern only factual issues.[88] The court's instructions to the jury usually narrow their deliberations to specific questions. The use of special verdicts or interrogatories may affect the scope and nature of the jury's deliberations.[89]

As scientific and technologic advances increase the complexity of triable issues, there is greater concern that lay juries will not be able to cope with the influx of information.[90] Jurors are not trained or experienced in receiving information or being able to assimilate varying types of messages. Some critics argue that juries should be abandoned in such cases and that specialized fact finders be employed.[91] Trial attorneys seem to favor existing practices.[92]

Witnesses

Witnesses are necessary in most cases to convey essential facts to the decisionmakers. At the same time, however, witnesses are conveying more than facts. While they are key players, there is no assurances that these individuals are able to fulfill their primary function. Witnesses are chosen because of their knowledge and not their communication skills. Some persons, such as police officers and experts, may be experienced in testifying, but generally a witness is appearing at a trial for the first time. They may be nervous or unsure of themselves. The amount of coaching which can be done may be limited since access to potential witnesses may be restricted[95] and overcoaching can potentially be used against a party.[96]

In some circumstances the witness is not available to testify in person and a deposition may be read to the factual decisionmaker.[97] Attorneys vary as to the best method for presenting such depositions - by reading it or by having an associate assume the role of the deponent. In either case, the jurors are unable to observe the emotions of the witness and thus have difficulty in weighing the value of the testimony. In lieu of a written deposition, the testimony may have been preserved on videotape.[98] The witness' behavior can be seen, but again there are concerns as to whether or not a juror can properly evaluate the testimony.[99]

Appellate Court

The testimony is recorded for transciption in most trials in case the parties decided to appeal a judgment.[100] On review an appellate court typically concentrates on legal issues and does not upset the factual findings of a jury.[101] When confronting a hostile judge or jury, the goal of the trial lawyer may be to make the judge commit reversable error or to establish the basis for a mistrial.[102] In other circumstances the trial lawyer may be concentrating more on creating a record that will be persuasive to an appellate court rather than attempting to win the case at the trial level.

Press/Public

The lawyer's and client's objectives may go beyond the immediate confines of the trial. In some situations, the trial may be seen as a forum to express political or social statements,[103] or it may be felt that public opinion may influence the decisionmakers' verdict. The expressions of the courtroom observers or the general public can be sources of cues as to the value of individual testimony or the society's feelings as to the proper outcome.[104]

Client

The client should be considered a participant in the trial. Even if he or she never testifies but is present in the courtroom, the judge and jurors have the opportunity to observe his or her behavior and make an evaluation of non-verbal activities. When a party is a business entity, a live representative of a partnership or corporation may be present during the trial in an effort to convey a sense of personality.

Since the lawyer is typically the representative of the client, the party is in the position to dictate events. A client may instruct the attorney not to call certain witnesses or ask specific questions.[105] In a criminal trial, the accused may decide not to testify because of a prior criminal record or fear of the cross-examination.[106] It is also possible that the lawyer is merely trying the case to satisfy or please the client with all the communication at trial directed solely to the client.[107]

Means of Communication

There are limitations on the means of conveying information during direct and cross examination. These means should be considered separately from the style of communication used.

For the witness, the primary means of communication involves answering questions or presenting exhibits. At times the witness is allowed to narrate a story with few interruptions. Generally, the responses are restricted to direct answeres to specific inquiries. In either situation, it is possible for the attorneys and the judge to control the testimony and than the witness. Non-verbal communication may be more in the control of the witness.

The trial counsel has numerous ways of addressing the legal and factual decisionmakers. The frame and wording of the questions themselves may deliver information apart from the answers which follow. A common tactic is to ask a question which is known to be objectable in order to arouse the interest of the jurors.[108] Through objections[109] and sidebar discussions[110] information can be successfully transmitted. As previously stated, the attorney is constantly attempting to influence the decisionmaker in any manner possible including facial expressions, movement in the courtroom, interaction with others in and out of the courtroom.

Throughout the trial, the judge is either required or may choose to talk to the jurors. Prior to the commencement of the testimony, limiting instructions[111] may be given to direct the jurors' attention to the issues to be considered. In response to objections raised by attorneys concerning evidence at trial, the judge may order the jurors to disregard a question or answer.[112] Following the closing arguments, the judge charges the jury as to its tasks as the finder of facts. These charges are statements of the "law" as it applies in a given case but they may also suggest the judge's evaluation of the testimony or feelings as to a proper verdict.[113]

Exhibits and demonstrative presentations are some of the most effective means of communication during a trial. These may merely supplement oral testimony or assist the decisionmakers in their comprehension or understanding of that testimony. For example, a juror may be weak in analyzing verbal communications, but the sight of a physical object or actual experiment may be more meaningful.[114] In complex litigation, it has been suggested that the jurors be given daily summaries of the testimony.[115] Regardless of the manner in which the summary is written, it is arguable that the recap will have some influence on the jury.

Styles of Communicating

Like the means of communicating, the styles used by participants vary from person to person and situation to situation. To understand the direct and cross examination process, the following discussion suggests some of the varying styles that should be taken into account.

Appearance

Lawyers are aware of their appearance and will act and dress in a fashion designed to create an impression consistent with their perceived function in the trial of a case.[116] Witnesses are instructed to appear as clean-cut average individuals and to use language which will be inoffensive. Despite the antagonistic nature of the trial, politeness is typically shown to other participants.

Theatrics

In many ways the courtroom resemble a stage and the tools of the actor or director are often utilized by the trial lawyer. While other participants are generally required to remain in a stationary position, the attorney is often free to roam the courtroom.[117] By standing near the jurybox, eye contact between the witness and the jurors can be improved.[118] The ordering of the appearance of witnesses, for example, can be managed to present the evidence in a desired fashion.

Mannerisms can be employed by the participants in a trial to suggest the meaning of testimony. Showing disinterest or not attempting to rebut may hint that a witness' statments are unimportant. Badgering a witness may be meant to show that he or she is biased or trying to cover up something. Causing a commotion can have the purpose of distracting the jurors.[119]

Other Techniques

Persons receive information in differing modes. For example, a juror may be more receptive to descriptions of colors than sounds.[120] Attorneys are generally aware of these differences and attempt to insure that the intended information is being received by all jurors. The use of repetitions of facts or demonstrative exhibits may be used to insure effective results.

Attorneys disagree as to whether they should be aloof or emotional; friendly or belligerent; agreeable or argrumentative. The same concerns apply to witnesses.[121] This variety of behavior potentially influences decisionmakers by either enhancing receptiveness or providing cues as to the value of a message. Decisions as to how to conduct oneself may ever change during the trial.

Issues for Future Research

Within the legal community, there is interest and concern as to how effectively information is transmitted to a fact finder and how the actions of the various participants affect the flow of communication. The mass of materials that have been written concernin the conduct of trial lawyers and the manipulation of jurors is anecdotal at best. Communication eperts can perform a valuable service by conducting research on a wide variety of issues such as these delineated below.

Roles of the Judge

Influence on the jurors - Jurors are generally unfamiliar with the judicial process and might naturally look to the judge for guidance. For example, during the examination of a witness, does the judge's seeming disinterest connote either his disbelief of the testimony or his feeling that the information is of little value? Can the judge's admonishment of an attorney influence the jury's opinion of the validity of the attorney's case?

Activities as case-manager - The majority of case management is performed during the pre-trial phase.[122] Decisions made then will influence the trial of a case. As part of a pre-trial order,[123] the parties will exchange lists of witnesses and exhibits. Except for rare excuses, the lawyers are prohibited from calling individuals not on the list.[124] During the actual trial, the judge may endeavor to speed up the process by not allowing delays to find witnesses or by restricting possible repetitious testimony.[125] What effects are there when a "surprise" witness is or is not called?

Examining and calling witnesses - Through inherent powers or authority granted by rules of civil procedure, a judge may question a witness or even present his or her own witnesses.[126] Some judges feel compelled to utilize an independant expert when the parties' experts sharply disagree.[127] Opponents of this practice contend that the jurors, as well as the judge, are more likely to believe the court-appointed expert than the person employed by the adversaries.[128] What are the effects, then, of a court appointed expert?

Taking the case from the jury and formulating the issues - At various stages during the trial, the judge has the ability to make a determination that a party has not met a burden established by law.[129] From the lawyers' perspective, this means that communications must be directed to both the jurybox and the bench. The plaintiff must decide how much information has to be presented in his case-in-chief to avoid a directed verdict. For persuasive impact, it might be more beneficial to cross-examine a particular person, but the attorney may not be sure that the defendant will be required to present a case. For the jurors, the judge's rulings on such motions might be seen as clues as to his or her view of the evidence. In the case of multiple parties, how do jurors interpret the dismissal of one defendant and not another?

Instructions and jury charges are designed to assist the jury in its deliberations, but they also narrow the questions to be resolved. While the attorneys can suggest specific instructions, the judge makes the decision as to the wording and delivers the charges.[130] How do jurors interpret these instructions, and would different results occur if varied charges are given?

Roles of the Attorney

Hired gun or officer of the court - The trial lawyer is both the paid representative of a client and an officer of the court with an obligation to the judicial system. For the attorney, he or she must make decisions as to how a specific action furthers one or both of these roles. A tactic may be extremely effective in conveying a fact or feeling but approach the possibility of being unethical or breach an informal rule of acceptable conduct. Can the value of the tactic by tested as to its effectiveness so that the attorney can make a reasonable evaluation of the best method of proceeding?

The role assumed by the attorney may influence a juror's perception, and thus his or her receptiveness. If a person has a low regard for lawyers in general, will he or she be overly skeptical or see all acts as being deceptive? In criminal trials, is the prosecutor viewed as a public servant with no specific client and the defense lawyer as someone trying to beat the "system"?

Director or leading actor - In some ways, the lawyer is merely a director insuring that the evidence is presented in some orderly fashion. Since he or she must also serve as an advocate, the attorney is also a leading player in the overall trial process. The duty to persuade is not isolated to the closing arguments but spills over into the other stages. Can a juror make the distinction between what role is being played?

In addition, certain lawyers perceive themselves as the principal character in the trial. They may attempt to dominate the proceedings. Can it be determined when the jurors are more interested in the lawyer's antics than the testimony? Is a juror making his or her decision based upon an emotional response to the attorney or on the facts?

Roles of the Jury

Investigating - While being asked to make factual determinations, jurors are restricted in their ability to obtain additional information. Except in unusual circumstances, a juror is not allowed to ask questions which may clarify a point or clear up any confusion.[131] How does one resolve a conflict in the testimony or a curiosity as to a missing piece of information?[132] What effect is there if jurors are allowed to ask questions? What effect would there be in re-opening evidence to satisfy a jury's curiosity?

Note taking - Jurors are asked to draw out the facts from a series of communications and then to remember them. Legal professionals differ as to whether or not jurors should be allowed to take notes during the course of the trial.[133] What is the impact of the practice? Does it increase the retention of information or concentrate attention on the few facts considered important to the note taker? The use of trial summaries raise similar questions.

Specialized panels - Some scholars have argued that lay jurors are incapable of handling complex scientific and technical matters.[134] It has been suggested that either educational requirements be imposed or complex factual determinations should be made by panels of experts.[135] Opponents to such plans point to the constitutional right to a jury trial and a traditional belief that lay people can make determinations free from bias.[136] When juries make incorrect decisions as to scientific facts is it because of a lack of ability or because the attorneys fail to present all the necessary information in an understandable fashion?

Doers of "justice" -The judge is under an obligation to enforce the law, and a jury's verdict must comply with established legal standards.[137] A jury is allowed to stray from these legal norms more than a judge. For example, while compromise verdicts are subject to reversal,[138] confidence in the judicial system may require the parties' acceptance of such compromises.[139] The aim of the attorneys may be to get to the jury and create sympathic feelings.[140] Do jurors understand their unspoken function? Are they able to determine who deserves society's sympathy?

Roles of Other Participants

Creating a meaningful record - If the strategy is to obtain a reversal by an appellate court, several issues are raised for study. Since the main source of information is oral testimony, how possible is it to translate oral events into written form? The hostility of a witness may not be evident from the words spoken. Appellate court justices may be unwilling to sift through a morass of information; can a trial lawyer risk presenting facts in a clear and concise fashion for the reviewing court when a secondary goal is to confuse the jurors?

Effective use of expert witnesses - A by-product of modern society has been the specialization of knowledge and thus the need to rely on experts. Lawyers are in a quandry as to when an expert should be utilized and who would be a good expert.[141] Rules of evidence dictate the minimal qualifications as to expertise and what kinds of testimony may be given.[142] Many questions remain unanswered. Should the emphasis be on a thorough discourse on the subject matter or on simplifying complex terms or concepts into everyday language? Do jurors respond more favorably to being overwhelmed by the expert's knowledge or to being treated as competent persons who only need aid in understanding a unfamiliar topic?

Press coverage - Both legal and non-legal commentators have argued as to the role of the press in the courtroom.[143] When can the press be completely barred?[144] Should television cameras be allowed in the courtroom?[145] Research should not be restricted narrowly to the impact of coverage on participants in specific trials but should include how news coverage influences the trial process in general. Does the possibility of notoriety either foster one's desire to testify or be on the jury or inhibit it? Do accounts of some litigations give false or misleading impressions as to what goes on during a routine trials?

Press as access to the public - Is a trial a proper forum for debating political or social issues? Clearly, individuals with minority or unpopular points of view have attempted to use the courts in this manner.[146] Likewise, prosecutors say that a message should be sent to the criminal element that the courts are "getting tough on crime".[147] In either situation, it is necessary to determine if jurors can separate these generalized messages from the facts actually germane to the case being tried?

Issues in Direct and Cross Examination

Use of depositions - Inability to have witnesses appear in person - due to deaths[148] or availability[149] - has become an increasing problem. While testimony can be preserved through the taking of depositions, how to do jurors receive such depositions in comparison to statements of live witnesses? What method of presentation is most effective?

Use of videotaped depositions - Technological advances permit the recording of a deposition on videotape. Again, do jurors receive such a presentation differently from that of a live witness? Can the appearance of being staged be avoided or will individual jurors be leery because of their experience with television broadcasts?

Presenting all the testimony by videotape - Because of interruptions by counsel or the bench may be distracting and utterances of inadmissible statements by witnesses, some commentators have suggested that an entire trial be staged without the jury, that the trial be videotaped, and an edited tape be shown the the jury.[150] Jurors' attention would be directed to a television screen without the normal interruptions associated with the courtroom. Would this practice give jurors a different feeling for the litigation process and their function? Would the absence of non-factual or non-testimonial data change the outcome? What the qualities of a good trial lawyer be different?

Multi-level decisionmaking - A jury is asked to make a series of decisions. For example, in a products liability suit, the first question is whether the product was the cause-in-fact of the injury;[151] then, was the defendant's actions the proximate or legal cause;[152] and, finally, what were the plaintiff's damages. In routine cases, evidence is heard on all issues, and the jury decides each issue in a single deliberation session. Do jurors structure their thinking process to make their determinations in a sequential fashion? Can the facts be segmented into varied fields or is there an overlapping? A judge can order the issues be tried separately.[153] What is the impact of the use of this technique? One argument is that the jury must be aware of lthe plaintiff's suffering in order to properly guage a defendant's legal duties.[154] In similar fact situations, would the outcome be different as a result of the jury's being apprised of the nature and extent of the harm?

Multiple parties - A fact of modern trials is the presence of multiple plaintiffs[155] and defendants.[156] The verdicts are made as to individual parties. Are jurors capable of attributing specific facts to specific parties? For example, does a sympathetic reaction to one plaintiff transfer to the others or does dislike of one corporate entity tainted a feeling toward all the defendants? As the number of lawyers increases, with their differing styles and objectives, does the jury become more susceptible to being mislead or confused?

Issue preclusion - Through either the use of collateral estoppel[157] or judicial notice,[158] certain facts will be told to the jury. Questions have arisen as to whether or not the jury is truly bound by such declarations.[159] An unanswered question is what value is given such facts.

Are they given as much weight as determinations made by the jury itself form the evidence?

Issues in Supplementing Direct and Cross Examination

Use of learned treatise - Experts commonly rely on books written by other scholars in forming their opinions. Whether the jury should have access to these treatises is an unresolved issue in the legal system.[160] Would jurors benefit by having such access? Would there be a difference if they were shown only excerpts or if they had the opportunity to examine the entire work?

Exhibits and experiments - If one assumes that individuals receive and analyze information in different ways, then the use of exhibits and demonstrations can play a vital role in the communication process. Which methods of presenting such nonverbal testimony are most effective?

Summaries and charts - Decision-makers commonly request distillations of lengthen reports or summaries of studies. Within the judicial system, there is currently a debate as to whether or not jurors should be allowed to use such devices.[161] Opponents argue that regardless of a judge's instructions jurors will consider such summaries as evidence. How do jurors really utilize these tools?

Juror's knowledge - A juror brings with him or her a body of knowledge and set of experiences. Comments on the testimony are colored by both. How does a trial lawyer overcome any misconceptions which might be inherent in a juror? For example, can an elderly person with an affluent background be made to see events through the eyes of a disadvantaged youth?

FOOTNOTES

Francis E. McGovern, Professor, Boston University School of Law

James H. Davis, Research Associate, Cumberland School of Law

[1] Robert W. Millar, "The Formative Principles of Civil Procedure - I," Illinois Law Review, 18 (May 1923), 16.

[2] Wayne McIntosh, "150 Years of Litigation and Dispute Settlement: A Court Tale," Law & Society Review, 15 (1980-1981), 823-848.

[3] For examples, see Joseph Kelner and Francis E. McGovern, Successful Litigation Techniques (New York: Matthew Bender & Co., 1981) or Melvin M. Belli, Modern Trials (St. Paul: West Publishing Co., 1982).

[4] The following publications concentrate on such articles: Defense Law Journal, Litigation, Trial Lawyer's Guide, and Trial Lawyers Quarterly.

[5] Ulrich Gautier, "Judicial Discretion to Intervene in the Course of the Trial," Criminal Law Quarterly, 23 (Dec. 1980), 88-124.

[6] A. C. Wright, "French Criminal Procedure," Law Quarterly Review, 44 (July 1928), 324-343.

[7] Alfred Gitelson and Bruce L. Gitelson, "A Trial Judge's Credo Must Include His Affirmative Duty to Be an Instrumentality of Justice," Santa Clara Lawyer, 7 (Fall, 1966), 7-25.

[8] Comment, "Questioning of Witnesses by Jurors," American University Law Review, 27 (Fall 1977), 127-160.

[9] R. B. J. Campbelle, "Rules of Procedure for Courts with Juvenile Jurisdiction in Tennessee," Tennessee Bar Journal, 18 (May 1982), 20-30.

[10] John M. Striker and Andrew O. Shapiro, How You Can Sue Without Hiring a Lawyer: A Guide to Winning in Small Claims Court (New York: Simon and Schuster, 1981).

[11] See note 7, supra.

[12] Judith Resnick, "Managerial Judges," Harvard Law Review, 96 (Dec. 1982), 374-448.

[13] Because of their autonomy, federal judges have been able to demand that attorneys comply with strict standards as to behavior, such as having to request permission before approaching a witness.

[14] See materials cited in note 3, supra.

[15] Robert P. Hobson, "Selection of the Jury, Opening Statements and Closing Arguments," Nebraska Law Review, 32 (1952), 302-311.

[16] Laurens Walker, John Thibaut, and Virginia Andreoli, "Order of Presentation at Trial," Yale Law Journal, 82 (Dec. 1972), 216-226.

[17] John J. Cound, Jack H. Friedenthal, and Arthur R. Miller, Civil Procedure: Cases and Materials (St. Paul: West Publishing Co., 3d ed. 1980), p. 766.

[18] Charles E. Robbins, Attorney's Master Guide to Expediting Top-Dollar Case Settlements (Englewood Cliff, N.J.: Executive Reports Corp., 1975).

[19] Mason Ladd, "Witness," Rutgers Law Review, 10 (Spring 1956), 523-540.

[20] Robert F. Peckham, "The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition," California Law Review, 69 (May 1981), 770-805.

[21] For example, during the pre-trial conference, a party may have informed the judge of an unusual legal theory or piece of evidence.

[22] Ted Finman, "The Request for Admissions in Federal Civil Procedure," Yale Law Journal, 71 (Jan. 1962), 371-436.

[23] John A. Baumann, "Evolution of the Summary Judgment Procedure," Indiana Law Journal, 31 (Spring 1956), 329-355.

[24] James J. Flanagan, "Offensive Collateral Estoppel: Inefficiency and Foolish Consistency," Arizona State Law Journal, 1982 (1982), 45-78.

[25] John J. Cound, Jack H. Friedenthal, and Arthur R. Miller, Civil Procedure: Cases and Materials (St. Paul: West Publishing Co., 3d ed. 1980), p. 766.

[26] Searcy W. Harrell, "Adverse Party as a Witness," Arkansas Law Review, 17 (Summer 1963), 136-146.

[27] Ronan E. Degnan, "Non-Rules Evidence Law: Cross-Examination," Utah Law Review, 6 (Spring 1959), 323-344.

[28] Bruce J. Berger, "Prosecution's Rebuttal Argument: The Proper Limits of the Doctrine of 'Invited Responses,'" Criminal Law Bulletin, 19 (Jan./Feb. 1983), 5-21.

[29] John J. Cound, Jack H. Friedenthal, and Arthur R. Miller, Civil Procedure: Cases and Materials (St. Paul: West Publishing Co., 3d ed. 1980), pp. 768-770.

[30] Charles C. Scott, Photographic Evidence (St. Paul: West Publishing Co., 2d ed., 1969), Vol. 3, pp. 266-271.

[31] Bernard Manning, The Criminal Trial: Volume II Evidence (South Berlin, Mass.: Research Publishing Co., Inc. 1980), pp. 20-22.

[32] James Marshall, Kent H. Marquis, and Stuart Oskamp, "Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony," Harvard Law Review, 84 (May 1971), 1620.

[33] Id.

[34] Kevin Tierney, How to Be a Witness (Dobbs Ferry, New York: Oceana Publications, Inc. 1971), pp. 36-46.

[35] Federal Rules of Evidence.

[36] Individual states have adopted rules which are similar to the federal rules in many aspects but differ in others. For the variations consult Pike and Fischer, Inc., Federal Rules of Evidence Service (Wilmette, Illinois: Callaghan & Co., 1979).

[37] Ronan E. Degnan, "The Law of Federal Evidence Reform," Harvard Law Review, 76 (Dec. 1962), 275-302.

[38] Roger C. Park, "McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed By Suggestions to Law Teachers," Minnesota Law Review, 65 (March 1981), 423-458.

[39] Melvin M. Belli, "The Expert Witness: Modifying Roles and Rules to Meet Today's Needs," Trial, 18 (July 1982), 34-37.

[40] "Materiality ordinarily relates to the pertinency of offered evidence to the issue or to the issue of credibility...Relevancy on the other hand, relates to the probative valve of evidence in relation to the purpose for which it is offered." Mason Ladd and Ronald L. Carlson, Cases and Materials on Evidence (Chicago: Callaghan & Co., 1972), p. 112.

[41] Herman L. Trautman, "Logical or Legal Relevancy," Vanderbilt Law Review, 5 (April 1952), 385-413.

[42] See note 34, supra.

[43] Irving Younger, "Practical Approach to the Use of Expert Testimony," Cleveland State Law Review, 31 (Winter 1982), 1-42.

[44] Ralph C. McCullough and James L. Underwood, "How to Prepare and Use Demonstrative Evidence in a Civil Trial," Practical Lawyer, 28 (March 1982), 19-34.

[45] Note, "Admissibility of Hospital Records," Albany Law Review, 37 (1973), 579-591.

[46] Randolph A. Bain and Cynthia A. King, "Guidelines for the Admissibility of Evidence Generated by Computer for Purposes of Litigation," University of California at Davis Law Review, 15 (Summer 1982), 951-971.

[47] See note 44, supra.

[48] Robert F. Seltzer, "The Artful Application of Graphic Evidence," Journal of Product Liability, 4 (Summer-Fall 1981), 255-263.

[49] Julian A. G. Dickson, "Capsule Summary: Revision of the Rules of Court in the Province of New Brunswick," University of New Brunswick Law Journal, 31 (1982), 282-295.

[50] Alexander Holtzoff, "Origin and Sources of the Federal Rules of Civil Procedure," New York University Law Review, 30 (May 1955), 1057-1080.

[51] Peter Westen, "Confrontation and Complusory Process: A Unified Theory of Evidence for Criminal Cases," Harvard Law Review, 91 (Jan. 1978), 567-628.

[52] Casenote, "Limiting the Use of Deposition at Trial," New Mexico Law Review, 10 (Winter 1980), 207-215.

[53] John A. Decker and John R. Decker, "Special Verdict Formulation in Wisconsin," Marquette Law Review, 60 (Winter 1977), 201-296.

[54] Marion R. Smyser, "The Rule 50(a) Directed Verdict - Its Function and Criteria in South Dakota," South Dakota Law Review, 19 (Winter 1974), 39-86; Marion R. Smyser, "The Rule 50(b) Judgment Notwithstanding the Verdict - Its Function and Criteria in South Dakota," South Dakota Law Review, 21 (Winter 1976), 105-118.

[55] Comment, "Severance of Issues in Personal Injury Trials: Generally and in Oregon," Willamette Law Journal, 9 (March 1973), 138-154.

[56] Jack Weinstein, "Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power," Vanderbilt Law Review, 14 (June 1961), 831-853.

[57] Steven Flanders, "Local Rules in Federal District Courts: Usurption, Legislation or Information?" Loyola of Los Angeles Law Review, 14 (1981), 213-280.

[58] State judges have utilized non-jury trials, multiple juries, and single issue trials.

[59] Richard H. Underwood, "Curbing Litigation Abuses: Judicial Control of Adversary Ethics - The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure," St. John's Law Review, 56 (Summer 1982), 625-668.

[60] Ted Finman and Theodore Schneyer, "Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critiques of the Work of the ABA Committee on Ethics and Professional Responsibility," U.C.L.A. Law Review, 29 (Oct. 1981), 67-167.

[61] Casenote, "Civil Procedure - Directing a Verdict in Favor of the Party with the Burden of Proof," Wake Forest Law Review, 16 (Aug. 1980), 607-620.

[62] Morris D. Forkosch, "The Nature of Legal Evidence," California Law Review, 59 (Nov. 1971), 1356-1383.

[63] "Witness Creditability: An Application of Psychological Data," For Defense, 23 (Oct. 1981), 18-22.

[64] Michael H. Graham, "Impeaching the Professional Expert Witness by a Showing of Financial Interest," Indiana Law Journal 53 (1977-1978), 35-54.

[65] Leon Jaworski, "Witness and Their Examinations," Insurance Counsel Journal, 29 (Jan. 1962), 80-89.

[66] See note 56, supra.

[67] For the criminal lawyer, the jury's inability to reach a decision as to guilt means that his client remains free.

[68] For example, dropping a pencil at a dramatic point or soliciting minute details about the operations of a machine.

[69] Endeavoring to prove that person could not have transmitted a disease by showing that the person did not have one form of the disease.

[70] Marvin W. Mindes and Alan C. Acock, "Trickster, Hero, Helper: A Report on the Lawyer Image," *American Bar Foundation Research Journal*, 1982 (Winter 1982), 177-233.

[71] Warren Burger, "Some Further Reflections on the Problem of Adequacy of Trial Counsel," *Fordham Law Review*, 49 (Oct. 1980), 1-25.

[72] Clayton Hutchens, "Discretion of a Trial Judge...In Trial to Exclude Otherwise Admissible Evidence," *Dalhousie Law Journal*, 6 (May 1981), 690-698.

[73] See notes 53 and 54, *supra*.

[74] Robert E. Keeton, *Trial Tactics and Methods* (Boston: Little, Brown & Co., 2d ed. 1973), pp.295-302.

[75] John T. McNaughton, "Judicial Notice - Excerpts Relating to the Morgan-Wigmore Controversy," *Vanderbilt Law Review* 14 (June 1961), 779-806.

[76] Hamilton H. Hobgood, "When Should a Trial Judge Intervene to Question a Witness?" *Campbell Law Review*, 3 (Spring 1981), 69-76.

[77] John M. Sink, "The Unused Power of a Federal Judge to Call His Own Expert Witness," *Southern California Law Review*, 29 (Feb. 1956), 195-214.

[78] Michael J. Farrell, "Communication in the Courtroom: Jury Instructions," *West Virginia Law Review*, 85 (Fall 1982), 5-57.

[79] Note, "Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality," *Virginia Law Review*, 61 (Oct. 1975), 1266-1298.

[80] Note, "Limits of Judicial Intervention in Criminal Trials and Reversible Error," *Georgia Law Review*, 11 (Winter 1977), 371-386.

[81] E. W. Thode, "Code of Judicial Conduct - The First Five Years in the Courtl," *Utah Law Review*, 1977 (1977), 395-422.

[82] Alan Naff, "Breaking with Tradition: A Study of the U.S. District Judge Nominating Commissions," *Judicature*, 64 (Dec.-Jan. 1981), 256-278.

[83] Larry C. Berkson, "Judicial Selection in the United States: A Special Report," *Judicature*, 64 (Oct. 1980), 176-193.

[84] Stuart S. Nagel, "Multiple Correlation of Judicial Backgrounds and Decisions," *Florida State University Law Review*, 2 (Spring 1974), 258-280.

[85] Comment, "Juries - Jurors Questioning Witnesses," Iowa Law Review, 44 (Spring 1959), 604-609.

[86] Christopher B. Mueller, "Juror's Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)," Nebraska Law Review, 57 (1978), 920-973.

[87] Note, "Jury Misconduct in Iowa," Drake Law Review, 20 (June 1971), 641-651.

[88] Stephen A. Weiner, "The Civil Jury and the Law-Fact Distinction," California Law Review, 54 (Dec. 1966), 1867-1938.

[89] Robert I. Berdon, "Instructive Interrogatories: Helping the Civil Jury to Understand," Connecticut Bar Journal, 55 (June 1981), 179-206.

[90] Note, "The Right to a Jury Trial in Complex Civil Litigation," Harvard Law Review, 92 (Feb. 1979), 898-918.

[91] Ellen R. Jordan, "Specialized Courts: A Choice?" Northwestern University Law Review, 76 (Dec. 1981), 745-785.

[92] Martin H. Radish, "Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making," Northwestern University Law Review, 70 (July-Aug. 1975), 486-532.

[93] Deleted.

[94] Deleted.

[95] W. W. Herndon and J. J. Karl, "Demonstration: Preparation of a Witness to Testify," ABA Antitrust Law Journal, 47 (Jan. 1978), 123-140.

[96] Robert E. Keeton, Trial Tactics and Methods, (Boston: Little, Brown & Co., 2d ed. 1973), pp. 30-42.

[97] See note 52, *supra*.

[98] "Effects of Videotaped Testimony in Jury Trials: Studies on Juror Decision Making, Information, Retention, and Emotional Arousal," Brigham Young University Law Review, 1975 (1975), 331-373.

[99] A. Roger Witke, Thomas A. Higgins, and Charles Babcock, "Video Tape Is Worth a Thousand Words: The Use of Demonstrative Evidence in the Defense of a Automobile Products Liability Case: Open Forum," Insurance Counsel Journal, 50 (Jan. 1983), 94-105.

[100] William H. Erickson, "Trial Transcript - An Unnecessary Roadblock to Expeditious Appellate Review," Unversity of Michigan Journal of Legal Reform, 11 (Spring 1978), 344-358.

[101] Graham Parker, "Jury Reversal and the Appellate Court View of Law and Fact," Osgoode Hall Law Journal, 14 (Oct. 1976), 287-305.

[102] David A. Higley, "Justice and the Judiciary: A Look at the Partial Jurist," The JAG Journal, 29 (Winter 1977), 219-250.

[103] D. J. Hurson, "Trial of Highly Publicized Case - A Prosecutor's View," American Criminal Law Review, 16 (Spring 1979), 473-495.

[104] Comment, "Pretrial Publicity, Voir Dire and a Fair Trial," South Dakota Law Review, 21 (Spring 1976), 373-392.

[105] Robert S. Hunter, Federal Trial Handbook (Rochester: Lawyers Co-operative Publishing Co., 1974), pp. 45-48.

[106] Note, "Exercise of the Privilege Against Self-Incrimination By Witnesses and Codefendants: The Effect Upon the Accusedl," University of Chicago Law Review, 33 (Autumn 1965), 151-165.

[107] Wesley A. Cann, "Frivolous Lawsuits - The Lawyer's Duty to Say 'No,'" University of Colorado Law Review, 52 (Spring 1981), 367-391.

[108] Mark P. Denbeauz and D. Michael Risinger, "Questioning Questions: Objections in the Interrogations of Witnesses," Arkansas Law Review, 33 (1980), 439-489.

[109] Comment, "Objections - Howls of a Dog-Pound Quarrel," Campbell Law Review, 4 (Spring 1982), 339-369.

[110] During the course of a trial, the attorneys may wish to make legal arguments to the judge at the bench out of the hearing of the jury.

[111] P. H. Robinson, "Proposal for Limiting the Duty of the Trial Judge to Instruct the Jury Sua Sponte," San Diego Law Review, 11 (Feb. 1974), 325-352.

[112] Norman E. Fontes, Gerald R. Miller, and David C. Bender, "Deletion of Inadmissible Materials from Courtroom Trials: Merit or Myth?" Detroit College Law Review, 1977 (Spring), 67-81.

[113] Lawrence S. Severance and Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions," Law & Society Review, 17 (1982), 153-197.

[114] See note 99, supra.

[115] Note, "Chart Summaries: Jury Aids or Evidence," Baylor Law Review, 34 (Winter 1982), 168-176.

[116] Robert E. Keeton, Trial Tactics and Methods (Boston: Little, Brown & Co., 2d ed. 1973), pp. 1-9.

[117] Some judges, especially federal district judges, require that the trial counsel use a fixed podium.

[118] Archer E. Reilly, "Courtroom Advocacy," Capital University Law Review, 8 (Spring 1979), 192.

[119] William Martin, "An Interview with Richard 'Racehorse' Haynes," *Trial*, 14 (April 1978), 26-32.

[120] Woo Sik Chung, Dan W. Edwards, and George A. Roundtree, "An Application of the Theory of Communicative Competence in the Analysis of Juror's Decision-Making Structure," *International Journal of Comparative and Applied Criminal Justice*, 4 (Spring 1980), 95-104.

[121] J. M. Conley, W. M. O'Barr and E. A. Lind, "Powers of Language: Presentational Style in the Courtroom," *Duke Law Journal*, 1978 (Jan.), 1375-1399.

[122] Wade H. Sides, "Pre-Trial Conference and Order - Ready on the Firing Line!" *Memphis State University Law Review*, 9 (Symposium 1978), 387-428.

[123] *Id.*

[124] Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure, Vol. 6* (St. Paul: West Publishing Co., 1971), p. 603, n. 32.

[125] John R. Schmertz, "Relevance and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Rules of Evidence," *Federal Bar Journal*, 33 (Winter 1974), 1-20.

[126] See notes 76 and 77, *supra*.

[127] *Id.*

[128] I. F. Sheppard, "Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System?" *Australian Law Journal*, 56 (May 1982), 234-244.

[129] See notes 53 and 54, *supra*.

[130] George B. Powers, "Requests for Instructions," *Federal Rules Decisions*, 28 (1960), 239-250.

[131] See note 85, *supra*.

[132] Edises, "One-Way Communications: Achille's Heel of the Jury System," *Judges' Journal*, 13 (1974), 78.

[133] Note, "Taking Note of Note-Taking," *Columbia Journal of Law & Social Problems*, 10 (Summer 1974), 565-606.

[134] Note, "Preserving the Right to Jury Trial in Complex Civil Cases," *Stanford Law Review*, 32 (Nov. 1979), 99-120.

[135] William V. Luneburg and Mark A. Nordenberg, "Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation," *Virginia Law Review*, 67 (June 1981), 887-1009.

[136] See note 92, supra.

[137] Alan W. Scheflin, "Jury Nullification: The Right to Say No," Southern California Law Review, 45 (Winter 1972), 168-227.

[138] Comment, "Compromise Verdicts in Criminal Cases," Nebraska Law Review, 37 (1958), 802-819.

[139] See note 56, supra.

[140] A. H. Dudnik, "Prepare Your Client for Direct Testimony," Cleveland Marshall Law Review, 6 (May 1957), 256-263.

[141] John W. Castle, "Selecting and Preparing the Expert Witness," Litigation, 3 (Winter 1977), 28-29.

[142] Note, "Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence," George Washington Law Review, 48 (Aug. 1980), 774-790.

[143] David Tajgman and Mark D. Sendroff, "From Estes to Chandler: The Distinction Between Television and Newspaper Trial Coverage," Comm-ent, 3 (Spring 1981), 503-541.

[144] James B. Ball, "Protecting Access to the Criminal Court," Arizona State Law Journal, 1981 (1981), 1049-1066.

[145] Joanna Connolly and Diane B. Pierce-Gonzalez, "Cameras in the Courtroom of Massachusetts," Massachusetts Law Review, 66 (Fall 1981), 187-198.

[146] Stanley E. Preiser and Barbara H. Fleisher, "Controlling the Forces in the Trial of a Political Figure," Trial, 17 (Oct. 1981), 22-30.

[147] Clark R. Mollenhoof, "Prosecutors and the Press," Virginia Bar Association Journal, 7 (Fall 1981), 4-7.

[148] James W. Moore and Helen I. Bendix, Moore's Federal Practice, Vol. 11 (New York: Matthew Bender, 1982), pp. 249-251.

[149] Id. at pp. 251-259.

[150] "A Proposal for an Experiment with Pre-recorded Videotape Trials in New York," Record of New York County Bar Association, 36 (May-June 1981), 274-279.

[151] Arno C. Becht and Frank W. Miller, The Test of Factual Causation in Negligence and Strict Liability Cases (St. Louis: Washington University Studies, 1961).

[152] David E. Seidelson, "Some Reflections on Proximate Cause," Duquesne Law Review, 19 (Fall 1980), 1-42.

[153] See note 55, supra.

[154] See note 56, supra.

[155] Modern litigations arise out of common disasters or use of mass produced goods; separate trials are consolidated for trial.

[156] In civil suits, the plaintiff will sue all entities involved in the chain of commerce, or an individual defendant will make claims against other companies. In criminal trials, several defendants accused of the same crime may be tried together.

[157] See note 24, supra.

[158] See note 75, supra.

[159] Note, "Should Reliable Scientific Evidence Be Conclusive and Binding on the Jury?" Chicago-Kent Law Review, 48 (Spring 1971), 39.

[160] Marshall B. Kapp, "Medical Books as Evidence: An Attorney's Introduction to the Literature," Florida Bar Journal, 55 (Dec. 1981), 795-798.

[161] See note 115, supra.

COMMUNICATION STRATEGIES AND RESEARCH NEEDS IN DIRECT AND CROSS-EXAMINATION

Gordon I. Zimmerman

Advocates should enter the process of direct and cross-examination with a clear understanding of what communication is and what they are trying to achieve with it. However, if they become preoccupied with the demanding process of integrating rapid analytical thought, complex data, rigorous rules of evidence and trial procedure, and the spontaneous interaction with witnesses, they may not analyze in any conscious way the overall process of which their behavior is a part. Yet I believe that virtually every advocate has a theory of communication. It may be implicit, vague, and without systematic testing, but it is a theory nonetheless. We can observe the advocate's courtroom behavior and make some reasonable guesses about underlying beliefs and assumptions regarding communication and how it works.

Some attorneys appear to understand communication primarily as a *sender-oriented process*. Communication is a linear, one-way event. It is "sending information." If I have spoken or written, I have by definition communicated. Advocates in this theoretical camp appear to be especially interested in learning rules and absolute standards of delivery and appearance. They work hard on the cosmetics of their style, use practice as a way to insure the smoothness, fluency, and artistry of their "performance" in the trial. When the message has been uttered clearly and cleanly, it should be understood and appreciated. When such a message is not understood clearly, the receiver is usually to blame.

Another theoretical approach to trial communication may be called *message-oriented*. Attorneys who hold this perspective define communication as an entity, as a set of language symbols that comprise a written or spoken message. "Communication" may thus be viewed as something that exists in the world. It can be recorded, printed, and recalled for review. Who happened to have sent or received the "communication" is not as relevant as the inherent "content" of the message itself. Hence, message-oriented attorneys are most concerned with getting information into the trial, getting it uttered and admitted as part of the record.

While sender behaviors and message content are certainly important, I believe a growing number of trial lawyers are approaching communication from a receiver-oriented perspective. They define communication as I do: a process in which receivers assign meaning to the verbal and nonverbal events during the trial. Communication is not complete until human beings--jurors, judges, witnesses--have received and responded to information. What does a message mean? To find out, we must observe how the receiver responds. What is the message content? Whatever the receivers decide that it is.

The attorneys therefore focus on developing a deep understanding of the receivers' skills, predispositions, behavioral tendencies and limitations, and then work hard to adapt to these givens. Communication thus becomes a dynamic two-way process requiring spontaneous adjustments and feedback.

I believe that the most productive strategies for effective direct and cross-examination are based on a receiver-oriented theory. Communication behavior should reflect a rigorous adaptation to receivers: the witness, whose responses are interdependent with the advocate's questions; the jury, with varied demographics, attitudes, and receptive skills; the opposing counsel; the judge; and even future audiences such as the appellate bench. Designing strategies--developing skills--for direct and cross-examination can best be done within a context of specific receivers, purposes, and environments.

I

What are some problems we encounter in developing these strategies? The first is what I call the prediction-planning problem. The advocate makes guesses about what witnesses are capable of delivering, their strengths and weaknesses, and expected jury responses. Too often advocates do an excellent job of planning in a general way their overall strategy in calling a witness, but do not structure in advance the set of questions that will most likely achieve their goals.

Planning and prediction, from a communication viewpoint, mean that I must go beyond selecting my witnesses, deciding what content I want from each, and determining the order in which I'll call them. It means that I must learn enough about them to make intelligent judgments about which examinations will be straightforward and routine and which will be unpredictable and potentially troublesome. And once I've determined which witnesses are in the latter group, I should consider using methods of witness preparation and rehearsal. I should also test alternative ways of drawing out the information, of structuring the content. To predict more accurately, I might use surrogate receivers, a shadow jury to hear a crucial direct examination and provide their responses.

A second problem involves communication skills. Effective advocates recognize their own communication traits and learn about the innate skills and weaknesses of their witnesses. The heart of the skills problem is fluency, a standard of smoothness of delivery and absence of disfluencies like awkward inflection and pauses, misuse of words, ungrammatical phrasings, distracting physical mannerisms, and lack of coherence in ideas and data. Experienced lawyers know well that fluency skills vary widely in courtroom participants. But they also know that witness fluency can be improved, despite the many stressful characteristics of the trial process.

Yet a message-oriented perspective toward direct and cross-examination tends to minimize the communication skills problem. Information that is uttered, regardless of fluency, is somehow "in" the trial, duly recorded by a court reporter and available for use in final argument. It would be nice if this information could be presented with artistry, but at least the witness provided the content we needed.

Receiver-centered advocates know that in a human decision-making system, raw data cannot be separated from its presentational form. It does make a difference how the witness speaks. And the advocate's strategy should be to prepare witnesses to be more effective as a respondent--to familiarize them with what information will be sought, how questions will be phrased, and the simplest and most persuasive ways of responding.

A related problem is the attorney's own capability as a speaker. Direct and cross-examination not only demand fluency but also quickness, the spontaneous application of linguistic and vocal tools to the unpredictable and often changing demands of the process. The obvious strategy for improving these communication skills is behavioral training and practice. Preparation involving planning and assembling materials does not improve communication behavior. For skills to improve, one must do direct and cross-examination. Well-conceived training programs that include frequent performance and feedback are an important service outlet for professionals in communication.

A third strategic concern in examining witnesses is the nonverbal problem. Jurors receive and assign meaning to a wide variety of nonverbal messages. Some of them are "kinesic"--the physical features and behaviors of judges, attorneys, and witnesses. Some are "paralinguistic"--the ways in which vocal inflection modifies verbal information and prompts receivers to respond differently depending on how a message is delivered. "Object language" or artifacts can be an important factor, especially if jurors are distracted by or assign negative meanings to styles of dress and grooming. The "proxemic" dimension, the perception of space and distance as a nonverbal cue, varies in importance depending on the courtroom layout and the relative freedom of movement that the judge grants the attorney during examinations. (In some state courts, and in virtually all federal courts, an advocate may not move away from a speaker's lectern except when given permission to approach the witness.) The element of "time" can be an important nonverbal cue, especially when jurors perceive that the longer or shorter duration of a segment of testimony suggests its relative importance or weight in the case. Even "silence" can be an important nonverbal message, such as when a witness pauses a few seconds before answering a question.

During direct and cross-examination, the jury uses nonverbal cues to assess three key factors. First, is the witness credible, trustworthy, knowledgeable? What are his motives and attitudes? Second, is the attorney competent, ethical, well-prepared, fair? Third, what does the attorney think about the witness and the testimony? Effective advocates attempt to build, beginning with voir dire, a positive interpersonal relationship with the jurors, including liking and trust. If jurors like and trust the attorney, who in turn displays nonverbal attitudes (positive or negative) toward a witness and his responses, then those nonverbal cues become potent tools for persuasion.

From my perspective, every attorney should have a nonverbal strategy for each witness. Further, he should develop good "self-monitoring" skills, to be at any moment aware of personal behaviors to which jurors might assign meaning.

It is useful to note that while verbal behaviors during examination periods are tightly controlled by procedural rules and opponents' objections, nonverbal behaviors are rarely noted in the record or made the subject of an objection. Thus, the skillful manipulator of nonverbal tools may enjoy greater freedom in that tactic than with clever or argumentative verbal devices.

The fourth area of concern is the transactional problem. Communication is a process of interdependent behaviors. It is not like the dialogue in a play script where each actor responds with carefully memorized lines. Instead, each question asked, each message uttered, tends to elicit and sometimes predict the split-second choices that the next speaker will make. The attorney and witness are simultaneously senders and receivers in a reciprocal process of modifying each other's behavior. Since communication is transactional, we can draw several conclusions.

First, the unique style and behaviors of the questioner makes a difference in outcomes. A particular witness, regardless of competence or preparation, will provide subtly or even markedly different testimony depending on which attorney on a trial team asks the questions.

Second, equivocal or evasive witnesses prompt different reactions in the questioner. Some advocates can remain patient and persistent despite uncooperative answers, while others appear to lose their poise and adopt overly aggressive, intimidating styles that invite objections and elicit negative juror reactions.

Third, the transactional process is influenced by a kind of momentum. The speed and crispness of questions tends to yield similar response behavior from witnesses. Thus, in direct examination, the rambling open-ended questions seem to predict longer and more general replies. Brief, rapid leading questions in cross-examination are more likely to condition witnesses to respond in kind.

Fourth, the nonverbal style of the advocate is part of the transactional influence. Facial, bodily, and paralinguistic cues apparent in the questioning behaviors may encourage or inhibit candid and complete witness answers.

The final communication concern about direct and cross-examination might be called the receptivity problem. It refers to the ability and willingness of jurors to attend to the question-and-answer process throughout the trial. Most jurors have never before confronted such a difficult task of critical listening as they do in a trial. Their innate receiver skills may be poorly developed. Yet we ask them to spend hours and even days in passive reception of complex and varied testimony. We ask them to comprehend large quantities of talk, including frequently sophisticated information from experts, to evaluate witness demeanor for credibility, to remember specific data, and to integrate all this content into a coherent story line.

Even in the best listeners, complete or unwavering attention is rare. People move in and out of various levels of attention or distraction. They often respond emotionally to words and ideas that trigger subjective interpretations. They may tune out especially complex information, give imbalanced attention to emotional or visual material, and reinterpret data to fit more neatly into their own experience and attitudes. The combination of (a) lengthy and intricate testimony, (b) the stress of having to decide the fate of other human beings, (c) unfamiliarity with the senders and the courtroom environment, and (d) typically underdeveloped listening skills renders the direct and cross-examination process one of the most difficult tasks of receiving that most jurors will ever perform.

If reception is so difficult, then an important goal of the advocate is salience of information, developing content that is striking and memorable, that will not "get lost" in the flood of competing messages, that will stand out as significant when the jury deliberates. But advocates are proscribed from giving verbal signposts of saliency. They may not turn to the jury at a critical point during testimony and say, "Get ready, folks, because this next answer is the most important one that you'll hear from this witness." So nonverbal methods are useful alternatives for focusing attention. The attorney may change vocal emphasis abruptly, use a dramatic pause, change posture or move slightly. Visual material can add saliency. So can the building of questions topically and expressively to a climax, a final bottom line which jurors can remember.

During a training session of the National Institute for Trial Advocacy, I asked one of the student-attorneys to tell me which points in his ten minute direct examination of an expert witness were the most crucial to his case. He replied, "All of them are important." His viewpoint is a naive approach to the inherent problem of salience, to the receptive limitations of juror-listeners. While perhaps all of the questions have legal and logical relevance, only portions of the testimony will become important in jury deliberations. Communication professionals should urge advocates to be realistic in conforming to inherent limitations in juror receptivity.

The five problem areas above point to some general strategies for direct and cross-examination.

1. Trial preparation must go beyond developing complete and logical content. In my view, there is no "content" until words have been uttered by the witness, nonverbal behaviors have been observed, and meanings have been assigned by the jury. Hence, once the case has been prepared, the advocate must develop communication strategies.

2. The structure of questions to each witness is critical. The respondent is giving, after all, a mediated speech, a segmented oral essay. If an organizational plan for clarity and persuasion is important in other types of discourse, it is certainly critical in direct and cross-examination.

3. Witness preparation for direct examination is usually appropriate. It should include an assessment of that particular respondent's communication skills and emotional control under stress. It should also seek to change, when possible, negative nonverbal cues the witness might display.

4. Advocates must prioritize verbal content. They must ask, "What do I need to achieve here? What does the jury need to hear the witness say?" It is not what a witness could say, but what he must say, that should guide the examiner in preparing a questioning strategy.

5. The advocate must assess and develop personal communication skills. Training and practice should not be viewed as remedial for specific problems of unskilled attorneys, but rather as a normal and ongoing part of professional growth.

6. Trial preparation must occur with an eye toward the limitations of juror-receivers. The pacing of questions, use of visuals and exhibits, the order in which witnesses are called, the length of each examination period, and even the time of day for particular testimony may become factors in receptivity.

II

With these receiver-centered strategies in mind, what are some avenues for further research on the communication process during direct and cross-examination?

One obvious research question is, "What are the specific behavioral characteristics of the persuasive vs. unpersuasive, the efficient vs. inefficient examiner?" We have not yet developed a coherent model of the competent communicator skills for obtaining productive testimony. Suggestions from experienced trial lawyers regarding vocal factors, language, animation, physical appearance and clothing seem to be about as reliable as those rendered by instructors of communication and behavioral scientists. We are all advising on the basis of prior events--lawyers and law faculty on successful advocates they've observed and cases they've tried, and communication professionals on effective speakers they've observed and conclusions they've gleaned from fragmentary courtroom research. Neither group (practitioners or scholars) has much systematically derived data from real or mock trials, little comparison of observable questioner behaviors on one hand and juror responses and verdicts on the other. A comprehensive behavioral model must include, minimally, correlations between attorney questions, witness responses, and juror evaluations. Otherwise, we shall continue to build skills on a sender-centered model of what good direct and cross-examiners look and sound like, regardless of receiver-based outcomes.

Another research concern is the question, "What are the attention, comprehension, and retention capabilities of jurors?" Can we simply infer from research about presentational courtroom messages (opening statements, closing arguments, jury instructions) that the transactional process of direct and cross-examination is similarly related to juror reception? Or, is that transaction different, unique perhaps, and therefore not directly relevant to our study of attorney-to-jury messages? My own guess, based on my observations of attorneys in courtrooms and advocacy training programs, is that communication skill in opening or closing argument is not a reliable predictor of communication skill in direct and cross.

Some receptive skills of jurors may be enhanced by the give and take of questioning. It is probably easier for them to attend consistently to the sometimes lively and varied questioning periods than it is to comprehend and retain all that they hear. In examinations, the organization of the message may be more difficult to develop. Witness fluency may be marginal, and factors like jargon from expert witnesses or interruptions from opposing counsel may impede the flow of thought. Yet the jurors may have lasting memory of compelling testimony of some witnesses and may later recall subtle nonverbal cues that help them assess credibility. In sum, there are so many variables that set apart examination periods from direct attorney-to-jury communication that general models of receiver skills need more applied testing.

A third research question is, "What is the impact of witness preparation on testimony and trial outcomes?" Such preparation typically goes well beyond the factual information expected from the witness. In direct, how will the witness present the key information? Will visual aids be used? How will the witness dress and groom? What about eye contact, gesture, posture? And during cross-examination, what can the witness expect opposing counsel to ask? Communication specialists are often called on to assist with witness preparation, and we tend to provide common sense guidelines, or we apply research from other interpersonal contexts to the courtroom setting. Intuitively, we tend to agree with advocates that behavioral witness preparation must obviously have some desirable effects. But assuming that the witness, through preparation, does improve testimonial skills, what is the effect on jury perceptions and decision-making? We have no thorough research to answer this question with confidence. That witness preparation helps achieve major communication objectives still requires a rather broad inferential leap.

Fourth, "What is the effect of question wording, syntax, and delivery on witness responses?" Earlier I described a transaction as interdependent behavior; each person in a dyad is both affecting and affected by the other's communication choices. Attorneys learn early in trial work that they must "control the witness," maintain structure and direction, and adapt quickly to the unexpected. But how do they maintain that control while still conforming to procedural rules and standards of civility and decorum? The key to controlling witness responses probably lies in the artistry and strategy of communication behavior.

Can distance between advocate and witness be changed to induce a desired response? Does unwavering eye contact during a response reduce evasiveness? In what ways, if any, do short or long questions, positive or negative wording, active or passive voice affect witness behaviors? Do redundant patterns in language and delivery that elicit a series of brief "yes" or "no" answers on routine questions actually cause the witness to be less evasive on the critical "bottom line" question? Does a rising inflection at the end of a question prompt a more lengthy and equivocal answer than a downward inflection? Does the falling tone in the question imply to the witness that the answer is obvious and routine and should be given without hedging? Do witnesses tend to mimic verbal and nonverbal behavior of the questioner just as in other types of dyadic events like interviewing and counseling?

A final research area involves training. "What are the most effective methods for improving examination skills?" The communication profession assumes (a) that direct and cross-examination are best viewed as spontaneous transactions, (b) that these transactions involve split-second verbal and nonverbal choices, (c) that skillful communication choices improve outcomes, and (d) that these prudent choices can be learned through modeling, structured practice, and evaluative feedback. We do not deny the usefulness of brief seminars and readings with a cognitive focus, though we cannot assume that understanding of communication techniques necessarily leads to application in a trial. We do not deny the need for trial experience as a tool for skills improvement, though the lack of structured training and valid feedback may mean that such experience may lead to firmly entrenched bad habits. As communication instructors, we have observed dramatic improvements in communication skills as students tackle courses like persuasive speaking or argumentation and debate. We have seen equally dramatic training results in advocacy programs like those sponsored by the National Institute for Trial Advocacy or the Association of Trial Lawyers of America, and like in-house programs of many law firms.

But what kind of training is most effective? What impact do modeling demonstrations have on learner skills? Videotape playbacks and critiques? Are some examination skills, like the rapid and accurate analytical thinking that may be innate, less "teachable" than other skills, or perhaps even "unteachable"? And what about the programs themselves? Does a two- or three-hour speech about examination strategies at a bar association conference yield results in the attendees' future trial behavior? Is a compact program over a few days more effective training than briefer sessions spread over several weeks? To what extent can role-players in these mock situations realistically respond like actual witnesses? Do evaluations of examination skills reflect realistic juror perceptions? Overall, are learning objectives phrased behaviorally, and are reliable assessment methods used?

Training programs in advocacy skills are flourishing, but they require enormous amounts of precious resources in time, money, and legal talent. To justify this expense, we need additional research on methodologies and results, convincing evidence that the especially demanding skills of direct and cross-examination are improved by training. Communication professionals, with experience in changing verbal and nonverbal behaviors, may be in an especially good position to study the techniques of training for advocacy.

Direct and cross-examination are communication events. They are the essential features of a larger event, the trial. These events depend on attorney skills, on competencies that develop over time. To the extent that communication professionals can describe the process and improve the skills, we shall contribute to the strength of our system of justice.

Gordon Zimmerman is Associate Professor of Speech Communication,
University of Nevada, Reno.

A RESPONSE TO LEGAL STRATEGIES, COMMUNICATION STRATEGIES AND RESEARCH NEEDS IN DIRECT AND CROSS-EXAMINATION

Leroy J. Tornquist

In response to the papers on communication strategies, legal strategies, and research needs in direct and cross examination, three separate points will be discussed.

First, I will briefly summarize the three direct and cross examination papers and respond to their contents. Second, I will discuss research needs for the new and emerging subject of alternative dispute resolution. Third, I will examine the communication strategies and research needs for the subject of trial objections.

I.

Conference Articles Summarized

A.) The article "Examining Witnesses - Good Advice and Bad" by Loftus, Goodman and Nogatkin, (hereinafter referred to as Loftus) summarized selected advice given by trial lawyers. They either provided the empirical basis for the advice or indicated that there is no empirical basis. The advice in summary form is as follows:

1. Prepare your witnesses

a. Witness confidence and credibility are increased by preparation. Confidence, however, is not directly correlated with accuracy. It is correlated with jurors perception of accuracy and credibility.

b. Preparation can effect witness speech style. (1) The American dialect is more powerful than regional or foreign dialects. (2) Defendants who are polite and speak in gramatically complete sentences are more often aquitted.

c. Powerful speakers were thought to be more credible, intelligent, competent and trustworthy than powerless speakers. Powerful speakers speak without hedging (I think, it seemed like, kind of) without hesitation (well, um, er) without over politeness (sir, please), without overusing adverbial intensifiers (surely, definitely, very) and without a questioning intonation.

d. Use of hypercorrect speech is less persuasive. For example, a police officer saying "The suspect exited from his vehicle" is not as persuasive as saying "he got out of his car."

What the authors have pointed out is that the admonition (prepare your witnesses should be much more specific. THERE ARE SEVERAL RESEARCH QUESTIONS remaining concerning witnesses preparation. For example, (1) When is the best time to prepare a witness? (2) Who should prepare the witness? Should the witness be taken to the courtroom? Should the witness be taken to the scene of the occurrence?

2. Use plain simple language. Avoid jargon and legalese since most jurors do not understand legal jargon.

3. Avoid the use of negative construction. Q. "So there is no interview sheet, is that not correct?" A. "Yes." This question uses a negative construction. Jurors take longer to process negative sentences and have more difficulty in remembering them.

4. Use pragmatic implications. A pragmatic implication is a question that leads the hearer to expect something neither explicitly stated nor necessarily implied in a sentence. For example, "the fugitive was able to leave the country" leads people to believe that he left the country but it does not say this.

5. Use a strong beginning and end. Lawyers should begin with a strong witness and end with a strong witness. Furthermore, each witness examination should begin with a strong point and end with a strong point. Based on works of learning and memory the jury will best remember what it hears first and last. The time between the presentation of information and the deliberation causes problems. Jurors may forget the information and its source.

6. The more detailed the more convincing. The more vivid the information the more powerful. Compare the pallid with the vivid. PALLID "The defendant stumbled knocking a bowl to the floor." VIVID, "The defendant stumbled knocking a bowl of guacamole dip to the floor splattering the guacamole dip on the white shag carpeting." Vivid information is concrete, sensory, and personally relevant.

Empirical studies indicate that there is a difference between the ways in which prosecutors should ask questions and the way defense counsel should ask questions. Prosecutors, for example, should ask more detailed questions and defense attorneys should ask vague questions.

7. Use loopback questions.
Q. What happened next?
A. I got into my car.
Q. After you got into the car what happened?

The reason loopback questions are favored is that they repeat favorable testimony and provide some variation in question form. It also can be an effective way to ask the last question.

Repetition as a learning device is well documented and the permissable way to repeat is to use loopback questions.

8. Raise unpleasant facts on direct unless opposing counsel is unaware of the fact. A sincere disclosure of weaknesses will make the witness a human being and protect the witness from attack on cross examination. In effect the witness is immunized from attack by the cross examiner.

9. Call for an in court identification at the beginning of the testimony. Identify the defendant early to create the picture of the defendant committing the crime as opposed to a faceless abstract assailant.

11. Ask leading questions. A leading question suggest the answer to the witness. Leading questions assume certain facts and the jurors take the assumptions in the leading questions as true.

12. Elicit yes or no answers. Witnesses can be prevented from providing unanticipated answers if they are limited in their responses. Furthermore, attorneys can present their views of the case through the questions that they ask.

13. Use Tag Questions. Through tag questions witnesses are likely to accept the questions premises. Compare "You did see a bicycle, didn't you?", with, "Did you see a bicycle?". When open ended questions are used the witness is generally perceived to be more credible and intelligent than if closed questions are used.

13. Jurors equate assertiveness with confidence. Jurors tend to believe a witness that is confident.

14. Elicit I don't recall answers. The more often a witness replies I don't recall the more unreasonable the witness appears. Empirical evidence supports this view but it also supports the fact that truthful witnesses often do not recall specifics.

B) The second article is entitled "Communication Strategies and Research Needs in Direct and Cross Examination" by Gordon I. Zimmerman. He argues that a growing number of attorneys approach communication from a receiver-oriented perspective. Communication is a process in which receivers assign meaning to verbal and non-verbal events during the trial. Attorneys should develop strategies to persuade the receivers. There are problems.

First, the prediction/planning problem. Lawyers should be aware of how witnesses will be viewed by the jury. Those that are potentially troublesome should be given extra preparation. He even recommends a shadow jury.

The second problem is communication skills. Lawyers and witnesses should be fluent. Well conceived training programs with frequent performance and feedback are probably the best way for a lawyer to improve his direct and cross examination skills.

The third concern is the non-verbal communication of witnesses and lawyers. He distinguishes between the kinesic and paralinguistic characteristics of lawyers and witnesses. Kinesic refers to the physical characteristics of the trial participants. Paralinguistic refers to vocal inflection. Artifacts refers to the dress and grooming of the participants. The space and distance also give a non-verbal cue to the parties. The jury uses non-verbal cues to assess the credibility, trustworthiness, and knowledge of the witness.

The fourth problem is transactional. By this is simply meant that a trial is a live unpredictable happening because there are mixes of personalities that interact with each other.

The final concern is the receptivity problem. Most jurors are not trained in listening and when they have the responsibility of listening for an extended period of time they have problems. Therefore, the testimony should be striking and memorable.

C) The third article by McGovern and Davis is entitled "From the legal profession: Legal strategies and research needs in direct and cross examination." The paper describes the adversary process and suggests research needs.

Response to Research Papers

(1) Research Technique

Lawyers and psychologists use different techniques in developing theory. Psychologists such as Loftus, et. al., rely on empirical research while lawyers rely on courtroom experiences, observation of other lawyers, or writings in legal texts or periodicals. Differences in research procedure can, of course, lead to differences in results. It is somewhat surprising, therefore, that the research cited by Loftus confirms the standard advice given by trial lawyers.

Empirical research, however, should enrich the common suggestions given by trial lawyers. It will provide additions, deletions, and modifications to the generally accepted advice. The Loftus article gives greater particularity to generally accepted advice. For example, trial lawyers are advised to "prepare witnesses" before direct and cross examination. Loftus lists four separate subsections under the preparation of witnesses and provides the empirical data to support the particularized advice.

(2) Communication of Theory

One challenge is to better acquaint trial lawyers and judges with the research done by communication experts. Few trial lawyers read the journals used by professional communicators to publish the results of their research. This is not surprising because psychology and communication journals are meant for a much broader audience. The failure of communication between lawyers and social scientists regarding communication theory needs to be addressed.

We must acquaint lawyers with communication research in the field of direct and cross examination.

I have taught in approximately 100 trial advocacy seminars throughout the country, and I have worked with trial lawyers and judges who have been excellent teachers. Rarely do trial lawyers cite communication research on direct or cross examination.

(3) Receiver-Oriented Process

Dr. Zimmerman's source in concluding that attorneys are moving toward a receiver-oriented process is interesting. I know of few trial attorneys who would articulate the concept as he does.

(4) What is the Best Method for Improving Trial Skills?

Dr. Zimmerman's final question asked, "What are the most effective methods for improving examination skills?" That question has led to many teaching innovations over the past ten years. Continuing legal education has led the way for the law schools, because trial attorneys were willing to spend time and money seeking education designed to put legal theories into practice.

There are four trial advocacy institutes that cater to practicing lawyers. They are the National Institute for Trial Advocacy, the Court Practice Institute, the College of Advocacy of Hastings Law School, and the National College of Advocacy of the Association of Trial Lawyers of America.

The method of teaching trial advocacy has changed radically. In years past trial practice was taught by lecture. A trial lawyer or trial judge told large groups of lawyers how to try a lawsuit. Often the lecture would degenerate into a series of anecdotes or war stories. The new method of teaching exposes the student to the rigors of trying the lawsuit. The students learn by doing it. They have to handle a segment of the trial under the watchful eye of an experienced lawyer or judge. Each student is given individual attention.

Significantly, recent programs in which I have taught have utilized the services of speech professors and psychologists. They watch the lawyers during direct and cross examination and make helpful comments. I am hopeful that these experts will be able to communicate theory based on empirical data to students and lawyers

(5) Research Methods and Mock Trials

The McGovern and Davis comments on research methodologies deserve mention. They suggest use of mock trials to structure staged experiments. I have arranged approximately five hundred mock trials involving students and lawyers. Each of these trials would have been an excellent laboratory to study trial techniques and strategies. Although mock trials lack the reality of the and strategies. Although mock trials lack the reality of the courtroom they do provide a convenient laboratory in a controlled setting.

(6) Television in the Courtroom

An issue that should be added to the McGovern and Davis research list is the value of television in the courtroom. As more states approve the use of cameras in the courtroom important questions arise: 1. How does television in the courtroom effect witnesses generally? 2. How does it effect witnesses in sensitive cases such as rape and custody? 3. How does it effect jurors? 4. How does it effect lawyers and judges? 5. Does it have any effect on the outcome of the litigation? 6. What is the effect on the public? 7. Is the viewing public likely to misinterpret the trial result if shown only a small portion of the trial.

(7) The Adversary System

The McGovern article correctly pointed out that the "American legal system is adversarial in nature . . . . The onus is on each side to protect its own interests by submitting convincing evidence or by discrediting the opponents presentation." The research questions suggested by all three articles related to the adversary system. We should enlarge our vision of the quesitons that need to be answered.

Alternative Dispute Resolution

My purpose is to stimulate you to think in ways that you perhaps have not thought before. The underlying purpose of this seminar is to improve our system of litigation. In my view however, that is only one part of the question. WE SHOULD CONCENTRATE ON IMPROVING OUR LITIGATION SYSTEM AND CONSIDER OTHER METHODS TO RESOLVE DISPUTES. For all of its advantages there are problems with the present adversary system.

The adversary system is expensive, time consuming, and tension creating. Alternative systems are being suggested by those within and without the legal profession. Research is needed to determine and shape the alternative systems most effective to determine truth, settle disputes, and eliminate unjustifiable expense and delay.

Litigation is expensive. The cost of discovery including depositions, interrogatories, requests for admissisons, and motions is often enormous. Sometimes the cost of discovery is equal to or greater than the amount in controversy. Many members of our society are effectively denied access to the adversary system because of filing fees, the cost of discovery and legal fees. Even those who can afford litigation, such as large corporations, are considering alternatives that are less costly. We should work on ways and means to reduce the cost of litigation, but we should also consider alternative systems in appropriate cases.

Litigation is time consuming.

In many jurisdictions it takes years to reach trial because of the backlog of cases and the time necessary to complete discovery. Alternative systems will allow quicker determination of the dispute. Time sensitive cases are particularly well suited to arbitration.

The alternative dispute resolution system will have advantages to the court. It can help relieve the backlog on many crowded dockets and free the courts to spend their time on larger matters.

Litigation also causes anxiety

Anxiety causes problems in all litigation but particularly in areas such as child custody, and divorce. Alternative systems can be used to reduce the unnatural tensions. For example, in divorce cases it is customary for attorneys to advise their clients not to talk with their spouse until the divorce has been completed. Alternative systems allow the parties to work out their own solution with the help of a trained arbitrator or mediator rather than have a solution imposed by the court. Arguably this would have a beneficial effect on society. Child custody cases, for example, can best be determined by experts working with the parents to arrange a solution that is satisfactory to the parties, to the children, and society.

Domestic relations, misdemeanors, small claims, and juvenile matters are prime candidates for alternative dispute settlement. Empirical research that would support or refute the emerging theories concerning alternative dispute resolution is desperately needed. Empirical research is not likely to be done by the practicing bar because of the nature of law training. Therefore, alternative dispute procedures should be viewed as an opportunity by those skilled in empirical research.

ALTERNATIVE DISPUTE SYSTEMS-THE TRENDS

Alternative dispute systems are designed to enable people to resolve their disputes through mediation or arbitration without having to go through a formal judicial proceeding. The use of arbitration and mediation is increasing rapidly. Let me share with you the experience of the Pacific Northwest.

A. Civil Cases

In Portland, Oregon and in Seattle, Washington, all civil cases valued at $15,000 or less must be arbitrated before trial. Although arbitration is required, it is not binding, and a litigant retains the right to a jury trial. Experience indicates that about 90-95 percent of cases arbitrated do not go on to court.

Arbitration is fast and inexpensive. For example, arbitration of a dispute averages 45 days in Portland. The cost is low because arbitrator fees are less than $25 per hour, and are split by the parties.

B. Domestic Relations Cases

In Portland a court rule requires that all child custody and visitation issues go to mediation. Prior to the rule, it took 45 to 60 days to have a court hearing. Now it takes about 21 days.

California law compels mediation of custody disputes. In Los Angeles 98 percent of the cases are resolved without court intervention.

C. Commercial Disputes

Traditional litigation of commercial disputes is giving way to arbitration. This is happening for two reasons.

First, many commercial contracts provide that disputes be arbitrated rather than litigated. Standard form contracts published by Associated General Contractors and by the American Institute of Architects provide for arbitration of disputes. Individual corporations such as NCR and Sperry Univac routinely draft arbitration clauses into their sales and lease contracts. The American Arbitration Association alone administers thousands of commercial arbitrations. In 42 states, all uninsured motorist personal injury claims are arbitrated rather than litigated. By agreement, nearly all inter-insurance disputes between insurance companies are arbitrated. A new federal statute provides for arbitration of patent disputes. Several states provide for voluntary arbitration of fee disputes between attorney and client.

Business and corporate leaders, working through the New York Center for Public Resources, have assembled a panel of lawyers and former judges to arbitrate corporate disputes with the objective of avoiding litigation. Panel members preside over "mini-trials" or abbreviated presentations of their case and render a non-binding opinion. Based on the opinion, parties attempt to reach an out-of-court settlement, using a panel member as a mediator.

Second, recent statutes and court rules in many states require that minor cases be arbitrated before going to court.

D. Labor-Management Relations

During most of this century, most labor-management disputes have been resolved out of court through mediation, conciliation, and arbitration. The National Labor Relations Board, and agencies such as the Oregon employment Relations Board, will defer to an arbitrator's judgment in many cases involving charges of a statutory unfair labor practice. Recently many states have passed laws which result in increasing use of mediation and arbitration in labor-management disputes. For example, in 1973 Oregon adopted a statute allowing most public employees to strike (police, firefighters, and prison guards excepted), and implemented a complex dispute resolution system which involves mediation, factfinding, and arbitration. Washington and California have very different laws, but both have features of the Oregon statute.

One cannot practice in the labor-management field without understanding mediation, conciliation, factfinding, and arbitration.

Most practitioners are non-lawyers such as company personnel directors, union business representatives, and the like.

E. Other Disputes

International. International trade agreements often incorporate arbitration in order to avoid legal proceedings in foreign courts. Techniques such as negotiation, good offices, conciliation, mediation, and arbitration play important roles in the arena of public international law as well. Current examples of this process include the resolution of the Iranian hostage crisis, provisions in the new law-of-the-sea convention for the resolution of disputes by arbitration and the mediation of the conflict in Lebanon.

Administrative. Alternative methods of dispute resolution are increasing in the area of administrative law. Federal judges have mandated processes that insure a fair representation of competitive interests. Federal legislation has proposed the concept of regulatory negotiation as a means of constraining administrative discretion and insuring soundly based, equitable decisions.

Environmental. In recent years mediation has become an increasingly important method of resolving environmental disputes. Mediation has figured prominently in the resolution of environmental disputes such as the 1980 Foothills Dam in Denver, Colorado. Efforts of coal industry leaders and environmentalists to resolve their differences without litigation have dramatically underscored the promise of the process but also the need for lawyers to be more skilled in it.

Criminal. Many jurisdictions have criminal "diversion" systems which take small cases out of court and place them in mediation, conciliation, or arbitration.

Intergovernmental. The 1981 Oregon Legislature adopted a statute providing for arbitration of intergovernmental disputes, including state agencies and local governments.

F. The General Practice of Law

Statutes, court rules, and contractual provisions now force the general practitioner into the unfamiliar arenas of arbitration and mediation. Commercial trial lawyers and tort lawyers must now arbitrate. Domestic relations lawyers must now mediate.

The arbitration and mediation forums are new, expanding, and different. The nature of the general practice will change.

Evidence rules in arbitration allow testimony by affidavit. Medical testimony is admissible if it is on official letterhead. Rules of discovery are truncated. In mediation, there are no rules of evidence as such. Attorneys may deal ex parte with the mediator.

Thus, the general practitioner who is an advocate must adapt to unfamiliar procedures, rules, and techniques. Little will be learned from examining statutes and appellate court cases. The general practitioner will have an increasing need for articles, books, and workshops. Law students will need to know trial practice, appellate practice, arbitration practice, and mediation practice.

We expect that as business, domestic and tort litigators acknowledge the fact that mandatory mediation and arbitration will continue to exist and grow, they will demand continuing education.

Research Needs for Dispute Resolution

Listed below is a partial list of those dispute resolution topics that could benefit from research.

COST....is the cost of arbitration less than the cost of litigation? If the cost is less why is this so? Is the cost advantage the same in personal injury cases, labor cases, custody cases, divorce cases? Can litigation costs be reduced by using certain arbitration systems or lessons learned from arbitration systems?

TIME....Is the time between the percipitating event and the hearing less in arbitration? If so why? Is the time spent at hearing less in arbitration than it is in litigation? If so why?

RESULT....Is the result the same in litigation as it would be in arbitration? If not why not?

ANXIETY....Is the anxiety created by arbitration less than the anxiety created by litigation. If so why?

What is the role of the lawyer in dispute resolution? Can certain types of disputes be resolved without the aid of a lawyer? If so what are they?

EFFECT ON THE LITIGATION SYSTEM....If mandatory pre-trial arbitration is adopted what would the effect be on our system of litigation? Would that free courts to spend more time on serious cases? Would the Supreme Court have more time to spend on important cases if a portion of litigation was removed from our court system?

TYPES OF ARBITRATION....there are many types of arbitration. What types of arbitration are the most effective? Is court annexed arbitration more effective than the voluntary systems? If a trial de novo is allowed how many cases can we expect to proceed to a new trial?

EFFECT ON JUSTICE....Would certain parties fare better under arbitration than under litigation? For example would plaintiffs recover more often? Would they recover more? Would arbitrators tend to split the difference between plaintiffs demand and defendants offer?

III

Communication Strategies for Objections

During direct and cross examination a trial attorney must be prepared to make and overcome evidence objections. Objections raise special research problems that should be addressed when discussing direct and cross examination.

Analytically it is helpful to view the process through the eyes of the interrogating attorney and the objecting attorney. Each has different concerns.

1. Avoiding Objections

There are two basic limitations caused by objections - the form of question that may be asked and the content of answers that may be elicited.

(a) Form of the Question Objection

The five following question forms are prima facie objectionable:

1. Leading: Q: You are the victim of a burglary, are you not? (The question suggests the answer.)

2. Assumes a fact not in evidence: Q: After you left your apartment at 1010 S. State, what happened? (Assumes witness lives in an apartment and that it is at 1010 S. State Street.)

3. Narrative: Q: Please tell jury your story? (Witness could testify to inadmissible evidence before the objection could be made.)

4. Asked and answered: Q: What is your name? A: John Jones Q: Your name is John Jones? (Repetitive evidence necessarily delays trial.)

5. Compound Question: Q: You arrived home at 10:00 a.m. and then you started dinner?

Form of the question objections can always be overcome by citing the exception to the rule or rephrasing the question.

Therefore, form of the question objections are different than substantive objections.

(b) Substantive Objections.

Substantive objections include among others:

1. Relevance
2. Hearsay
3. Competence (spouse privilege or deadmans statute)

Here the objection is to the substance or anticipated substance of the answer.

Often, but not always, the objection can be overcome by experienced counsel.

Q: What did the defendant say to you? Objection. Hearsay.
Response: It calls for an admission by a party opponent.

Strategy in making the substantive objection is different than the form of the question objection. The reason is that the substantive objection may be necessary to protect the record and to prevent inadmissible evidence from reaching the trier of fact. In some cases it can not be overcome by the interrogator. The form objection as previously mentioned can always be overcome by the interrogator.

(2) Making Objections

Objections may be analyzed from two additional perspectives - knowledge and judgment. To know what objection is available is knowledge, to know whether to urge the objection is judgment. A trial attorney must have knowledge of evidence that can be exercised quickly in a trial setting. As important as knowledge is judgment. Should the objection be made? Will the interrogator be able to overcome the objection? Will the jury resent the interruption of the witness? Is the answer requested harmful or harmless?

The Need for Research on Objections

In deciding whether to make an objection trial attorneys could use the help of empirical research. Several research questions come to mind:

Jurors Reactions

1. How do jurors react to objections during direct examination? How do they react to objections during cross examination?

2. Do jurors react favorably if the objection is sustained, unfavorably if it is overruled?

3. Do jurors resent the attorney who asks to approach the bench to argue objections?

When:

4. Should substantive objections be made by a motion in liminae (before trial outside of hearing of jury)?

Where:

5. Should objection be made out of hearing of jury?

How:

6. Should speaking objection be made. "Your honor I object. We cannot cross examine what Mr. smith said outside of court. It is hearsay?"

7. If no objection is to be made concerning certain evidence should counsel state "no objection?"

Why:

8. Do jurors expect counsel to object and protect the witness from hostile or argumentative questions?

What:

9. Are jurors more attentive after an objection has been made? Are they more likely to retain the answer immediately after an objection?

To properly exercise judgment an attorney needs to know more about how jurors react to objections. It is a fertile field for research.

Conclusion

After reviewing the three papers on direct and cross examination several research categories are suggested.

The difference between the research technique used by lawyers and psychologists suggests that there will be differences in results. Therefore, it is important to communicate the research of psychologists and communication experts to practicing lawyers. For example, Zimmerman suggests that the communication process at trial should be a receiver oriented process. Most lawyers need to receive this advice since, in my opinion, lawyers articulate communication theory using different principles and terminology.

We need to research the best methods for improving trial skills. The national trial advocacy institutes and law schools could provide laboratories for this purpose. The mock trials used in the national institutes and law schools also provide the laboratory for researching the substance of trial procedure. For example, the effect of television in the courtroom on trial participants could be studied by using mock trials.

Two major research areas are the alternative dispute resolution systems and trial objections.

The assumption made by the three principal papers is that the adversary system is the boundary for research. Alternative dispute resolution systems provide a rich resource for meaningful research. One of the best methods of improving our adversary system is to remove certain disputes that can be more effectively decided by arbitration or mediation.

The last subject suggested for research is evidence objections during direct and cross examination. It is an integral part of direct and cross examination and often is not given the attention it deserves.

Leroy J. Tornquist, Dean, Willamette University College of Law, Salem, Oregon.

STAGING THE COURTROOM DRAMA: AN ANALYSIS OF DIRECT AND CROSS EXAMINATION

Janice Schuetz

A trial lawyer approaches witnesses using methods similar to a film director. Thomas Mauet explains: "The director can inject his own approach and perspective into the production. . . . He can choose the locations of his cameras, the angles of his shots, and the types of lenses."[1] In short, the trial process resembles the staging of a performance. The attorneys direct the performance; the jury serves as the audience; the judge acts as the stage manager; and the witnesses and the accused play the leading and supporting characters in the courtroom drama. Comparisons between courtroom process and drama frequently appear in the research about trial law.[2] This essay conceives of direct and cross examination as an important part of the dramatic action of the courtroom. In doing so, the essay (1) responds to each of the position papers, (2) discusses research needs, and (3) suggests a dramatistic model for analyzing the examination of witnesses.

Response to Position Papers

Each of the three papers contributes to part of a larger paradigm for research related to communication and the law. Zimmerman correctly challenges the communicative assumptions of the traditional sender and message-oriented approaches to courtroom persuasion. He notes the limitations of the linear and unidirectional assumptions associated with the sender message. Instead, Zimmerman recommends the use of the receiver-oriented approach in which meaning results from the interdependent interaction of witness, attorney, jury, and judge. Since the latter conception is both more complete and complex than traditional assumptions, it raises several issues about the nature of communication in the courtroom.

Zimmerman lists potential communicative problems as: (1) the problem of prediction and planning, (2) the need for oral communication skills, (3) the relevance of nonverbal behaviors, (4) the complicated nature of transactions between people, and (5) the questions about the receptivity of jurors to the complex communicative process. I commend Zimmerman for questioning the assumptions of courtroom communication and recommending that they be more in line with communication theories. The essay could be strengthened by adding references to the existing research and by presenting theoretical support for the conclusions he proffers.

Loftus, Goodman, and Nagatkin's paper questions the simplicity and certitude of current advice on direct and cross examination. The paper supports Zimmerman's claim that traditional theories of cross and direct examination are part of sender-oriented assumptions. Their essay challenges the advice legal books give about examining witnesses. They argue convincingly that current social science research is neglected in the simplistic rules given in law books. By comparing relevant research with the advice, the authors draw attention to a large body of research important to both communication and legal professionals.

The essay provides insightful information about the manner used by attorneys and witnesses, the grammatical choices of the questioner, the methods of achieving vividness in oral expression, and the impact of the different types of questioning strategies upon jurors. The position paper, in my opinion, successfully questions the recipes about how to examine witnesses; calls attention to several of the problems of oral and nonverbal expression; and provides a useful bibliography for scholars interested in the persuasive dimensions of the examination of witnesses. While I found the essay provocative and well-documented, it could develop additional implications and directions for future research. The essay takes a quite narrow view of witness examination which could be expanded by developing some of the interaction effects and by indicating the problems associated with social science research about courtroom persuasion.

The position paper of McGovern and Davis describes "the dynamics of direct and cross examination" as part of the trial process. Their essay provides a very broad overview of the trial proceedings including description of the rules of evidence, roles of trial participants, functions of testimony, and styles of communication. Even though the information is not new to most of us interested in law, the essay consolidates a great deal of bibliographic data through over one hundred and fifty footnotes.

In one sense the asset of the essay is its breadth; in another sense the liability is also its breadth. The reader gets not only a general description of the trial process but does not gain a clear understanding of the interaction between these aspects of the trial. For example, readers would benefit from some explanation of how the stages of the trial affect the examination of witnesses. While the paper effectively describes the process, it does not accomplish what it promises, that is, examine the dynamics of the process of examination of witnesses. McGovern and Davis foreshadow the complex interaction and the artistic quality of trial process when they remark: "In many ways, the courtroom resembles a stage, and the tools of the actor or director are utilized by the trial lawyer."

The papers add to our conceptual understanding of the problems and possibilities of research about direct and cross examination so that it fits with contemporary theories of communication, incorporates the results of current social science research, and investigates the complex and dynamic trial context.

Research Needs

The first need is to identify the variables affecting the examination of witnesses that are of mutual interest to scholars in law and communication. The papers identify numerous variables including: trial preparation, structure of questions, preparation of witnesses, nonverbal behaviors, grammatical correctness, fluency, descriptive and vivid language, syntax of questions, jurors' decisions, television coverage of examination, and the form and content of exhibits and charts introduced with witnesses.

The literature about examining processes refers to variables within rules or formulas. As a result, the variables are concealed within the statements of advice, devoid of theoretical justification, and unrelated to contemporary assumptions about persuasion. My investigation of law journals reveals only a small number of articles dealing directly with communicative variables. When these journal articles do address communicative factors, their treatment is often imprecise.

In addition to the variables suggested by the authors of the position papers, research about legal communication can draw from other perspectives. Rhetorical theory can contribute traditional concepts of proof, style, and arrangement and contemporary constructs of ideology, power, liking, and risk. Interpersonal literature can help refine understanding of perception, attraction, and listener retentiveness. Small group concepts could provide insight into juror decisions, juror dynamics and cohesiveness, and conflict management. Obviously then, communication professionals can apply some of their theoretical concepts to law, and, in doing so, identify significant variables affecting the examination of witnesses.

The second need is to develop theoretical models or frameworks to explain and interpret how these variables fit together in an interdependent and dynamic way. Each of the position papers recognizes the complexity of examination; that is, testimony affects and is affected by other processes in the trial. The multiple senders, receivers, channels, media, and contextual limitations contribute additional complexity to the workings of the trial. McGovern and Davis list numerous legal processes and call for research to explain the dynamic and complex interaction in the courtroom. Scholars interested in the interface between communication and law must begin to develop theories and models to explain courtroom dynamics. This work begins by researchers borrowing frameworks from social science that have been adapted for communication research.

Dramatistic theory is one useful starting point. Erving Goffman's theory presented in Presentation of Self in Everyday Life and Forms of Talk offers potential concepts such as character, setting, roles, performance, framing, footing, and response cries which can be employed to study the process of examining witnesses.[3] Kenneth Burke's dialectical pairs of the pentad--scene-act, scene-agent, scene-agency, scene-purpose, act-purpose, act-agent, act-agency, agent-purpose, agent-agency, and agency-purpose--provide a method for indexing and analyzing the motives present in the questions, responses, and inferences of testimony. Additionally, Burke's concepts of constitution, the negative, abstraction, mystification, and courtship could help to explain the semantic uses and effects of language used by questioners and respondents.[4]

Another approach is to use grounded theory as a means for identifying and categorizing arguments. This method, developed by Scott Jacobs and Sally Jackson, advocates the study of prototypes of argument that evolve in naturally occurring settings.[5] Although their method, to my knowledge, has not been applied to courtroom arguments, it could assist researchers in deciphering the argumentative and non-argumentative content evolving in direct and cross exam and in distinguishing the kinds of argument that characterize civil and criminal trials.

A third body of theory comes from attitude change and persuasion research. These theories provide obvious starting points for analyzing jury responses to testimony. Robert Abelson's "Modes of Resolution of Belief Dilemmas" and William J. McQuire's "Personality and Susceptibility to Social Influence" could help to explain jurors' divergent interpretations of the same testimony.[6] Herbert C. Kelman's "Process of Opinion Change" which differentiates strategies of compliance, identification, and internalization could be used to analyze the effects of attorneys' strategies on witnesses, jurors, and judges.[7]

Finally, ethical models of communication provide additional theories for explaining courtroom examination. Vernon Jensen's framework of "pseudo-reasoning" offers an excellent tool for analyzing ethical and unethical courtroom persuasion.[8] Wayne Brockriede's "Arguers as Lovers" describes ethical relationships between arguers according to power, risk, motive, and style.[9] His work could be used to investigate relationships between attorneys, witnesses, jurors, judges, and even the press.

Dramatism, conversational analysis, attitude change, and ethical models are only a few of the numerous explanatory theories that can serve as starting points for constructing theory related to the examimation of witnesses.

The third need is to apply theories to the practice of law. I intentionally place practice last because practice should be grounded in an understanding of relevant variables and pertinent theory. In other words, communication professionals should not engage in training, consulting, or research without first acquiring background in the legal process and gaining familiarity with research related to communication and the law. Practitioners of communication gain requisite knowledge by observing trials; talking with attorneys, judges, witnesses, and jurors; taking courses and serving as adjunct professors in law schools; and becoming conversant with research related to legal process and communication. These pursuits prepare practitioners to use their knowledge of communication in the legal context.

Training occurs with our own undergraduates in prelaw courses; inside law schools as we serve as advisers to classes in trial advocacy, moot court and legal interviewing; and with practicing attorneys who request our expertise for workshops and seminars. Ronald Matlon and David Hunsaker previously have noted the training curriculum and opportunities in each context.[10] This training should apply theories of language, nonverbal behavior, persuasion, and ethics. Vehicles for training include mock trials, questioning scenarios, written scripts of questions, and videotaping of hypothetical examinations.

In addition to knowledge and research background, working as a legal consultant requires contacts among the legal professionals who recognize our expertise and the benefits they can gain from our advice.[11] My consulting contacts have come through former students, from persons who have served as expert resources in my courses, and from persons who have participated in training or workshops I have done for other forums. Consultants need to be well-versed in the theory and practice of our own discipline and also possess general knowledge of the trial process. Consultants should confine their advice to what relates directly to communication and refrain from comments on legal issues. Consultants can use any theory or combination advocated in the position papers or develop their own models. The theory serves as the criteria on which consultants base their interpretations and make their evaluations.

Research is needed to refine the variables and theories and to verify the conclusions made by trainers and consultants. Conferences such as this one should provide for the sharing and refining of concepts between scholars from both professions. Additionally, communication professionals should present and publish their work at their own conferences and in their own journals and seek out new avenues for their work in legal forums. Sharing of research benefits both professions and results in the development of useful and realistic assumptions, variables, theory, and practice to improve the quality of communication in the legal process. A sample model, based on dramatistic theory, attempts to meet some of these needs.

Dramatistic Analysis of Trial Process

Dramatism encompasses transactional assumptions, social science research, and the dynamic interactive process of the courtroom into a framework for studying trial process.[13] The assumptions of dramatism have evolved through several stages. George Simmel notes that the dramatic art forms resemble the structure and function of social interaction.[14] Kenneth Burke views society as a drama involving human conflict. For him the "difference between 'staged' drama and the drama of real life is the difference between human obstacles imagined by the artist and those actually experienced."[15] In a similar way, Hugh D. Duncan emphasizes that social interaction is "a dramatic expression, an enactment of roles by individuals who seek to identify with each other in their search to create order."[16]

Dramatistic analysis of courtroom persuasion considers direct and cross examination as an integral part of the entire context in which the trial occurs. Dramatism stresses the contextual analysis which investigates the multiple interactions of the various people, processes, and effects constituting a trial event. Effective examination of witnesses depends on the interaction of the setting and the legal rules; the changing relationships between attorneys, judges, witnesses, and jurors; and the novel and creative persuasive adaptations to the style and content of the testimony, the publicity, and the decision-making of the jury.

The work of Erving Goffman provides a paradigm that includes many of these variables. He assumes that individuals plan their communication so that it fits with the norms and expectations of everyday social dramas.[17] In the trial process, the planning of the trial results from definitions of the legal situation. Preparing for the trial drama also features development of the character of the attorneys, the accused, and the witnesses; appropriate staging of the verbal and nonverbal communication; changing roles to manage impressions favorable to one's case; and presenting a believable performance for the jury.

Situation

Participants define a social situation in a certain way which predicts the behaviors that are to follow (p. 9). For attorneys in trial dramas, definitions consist of defining witnesses, deciding the purpose of examination, preparing the witnesses, and determining the position of witnesses' appearance in a trial.

Witnesses may be unpredictable because they undergo changes from the time of the crime to the time of the trial. Attorneys need to recognize the physical and mental changes, memory lapses, and even stage fright that their witnesses are likely to experience. Herbert Kuvin warns: "The trial attorney who has anything to do with witnesses must be ever conscious and aware of the human reaction, frailties and actions" of his or her witnesses.[18]

The purpose of direct examination is to provide sufficient evidence for the legal foundation of the case and to make the evidence relevant and credible to the jury. In contrast, the purpose of cross examination is to highlight testimony favorable to one's own position, discredit unfavorable testimony, and lay the groundwork for refutation of the opposition's case.[19] Both the planning of questions and the preparation of witnesses should follow general definitions of the situation and be guided by the purposes of examination.

Examining witnesses requires preparation. Obviously, attorneys prepare generally for the case by defining legal issues, determining facts, developing a theory of the case, deciding on the order of witnesses, and planning potential questions prior to the trial.[20] A crucial step for preparing witnesses is to meet with those who will testify for and against your case. Witness preparation is not coaching the witness on what to say, but it is making the person familiar with the important documents of the case. More specifically, attorneys review with their witnesses the pertinent data of the case such as depositions, written and oral statements, exhibits, and courtroom procedures.[21] Additionally, lawyers often suggest or practice questions likely to surface from opposing counsel in the cross examination of their witnesses.

Finally, attorneys determine the position of witnesses in the order and with the evidence that will be introduced into the trial. The direct examiner intentionally chooses the position of witnesses to promote a clear and logical theory of the case. Whereas carefully positioned witnesses establish a chronology for events, inappropriate positioning can produce a confusion about the case.[22] To ensure predictability for the courtroom drama, attorneys need to understand witness behavior and testimony.

Character

While correct responses to the situation predict the content and structure of the trial, it is the character attributed to witnesses by jurors that influences the decision of the trial. Goffman notes that character consists of the development of the internal qualities of the person such as knowledge, trustworthiness, and sincerity.[23] More simply, character reveals how witnesses present themselves in a way that will induce the jury to believe their portrayal. Attorneys reveal the character of their witnesses through scripts and delivery.

Although attorneys are prohibited from coaching witnesses directly, they can guide the content and length of the script of their witnesses by the questions they ask. Witnesses tend to develop appropriately detailed and salient scripts when their attorneys:[24]

- . encourage them to provide descriptive details.
- . ask questions in a chronological sequence.
- . repeat crucial data for facts in subsequent questions.
- . make causal connections between the testimony of witnesses.

Cross examiners try to alter the script presented in direct examination by modifying, disputing, and interpreting the content of the testimony.[25] Among the script-altering tactics used by cross examiners are the following:

- . forcing "yes" and "no" answers.
- . previewing questions with contradictory testimony.
- . pointing out omissions or oversights of the testimony.
- . using questions that elicit "I don't know" responses.

These tactics not only change the script but discredit the knowledge and sincerity of witnesses.

The delivery of both attorneys and witnesses affects the interpretation of the script by jury members. Morton Cooper advises attorneys to be aware of their own voices. He explains: "A lawyer understanding the power of the human voice has completely won the hearts of jurors by appealing to their sympathies. But proper use of voice requires training in "pitch, tone, focus, quality, volume, breath support, and rate."[26] The delivery of witnesses also affects jurors' perceptions of testimony. Conley, O'Barr, and Lind found that fluency and grammatical correctness aid witness credibility;[27] whereas Cone and Lawyer concluded that technical language and semantic abstractness detract from witnesses' credibility.[28]

Since a major part of attorneys' responses to the trial is to prepare witnesses, they should spend time on developing questions that will help witnesses present clear and detailed scripts and prepare them to deliver those scripts in a precise and understandable way. Theories of persuasion emphasize that how something is said is as important as what is said. Thus both script and delivery reflect the character of attorneys and witnesses.

Role

Roles constitute the third element of the trial drama. Whereas character refers to the internal qualities of witnesses inferred by script and delivery, role refers to the external characteristics of courtroom participation (ch. 6). More simply, roles are the slots people occupy in society such as father, truckdriver, friend, neighbor. Witnesses' testimony often begins with questions that reveal to the jury the roles of persons testifying. The witnesses' social roles can enhance or reduce the believability of their testimony. For example, a car salesman is more credible than a housewife in establishing the make and features of a car seen at the place of the crime.

Generally, roles refer to the prescribed behaviors of participants in the courtroom drama such as judge, jury member, accused, witnesses, defense and prosecuting attorneys. All roles are interdependent with all other roles. For example, the judges', jurors', and attorneys' behavior affect the witness and, in turn, the witnesses affect how they play their roles.

Courtroom procedures and rules dictate the kind of role that trial participants should adopt. Ideally, judges act as umpires, attorneys perform as committed and knowledgeable advocates, jurors listen as responsible and reasonable adjudicators, and witnesses respond like informed and accurate reporters. When any participants in the trial deviate from their prescribed roles, attorneys can object, the judge can intervene, the witness can be dismissed, and jury members can be replaced with alternates.[29] In reality, the ideal roles are seldom portrayed, and the legal sanctions are infrequently applied. Instead, courtroom reality manifests deviations from these ideal roles. Thus, judges act with prejudice, attorneys come unprepared, jurors respond with bias, and witnesses are unreliable. Effective trial attorneys prepare themselves and their witnesses for unexpected roles and alter questions to accommodate the idiosyncracies of each unique trial drama. Obviously, trials proceed more smoothly when the roles match the ideals, but courtroom persuasion often depends on the flexible adjustment of participants to the unexpected roles of other courtroom actors.

Performance

Performance is the act of fostering a favorable impression (p. 17). Goffman emphasizes that participants in social drama request their observers "to take seriously the impressions" they foster (p. 24). Performance consists of appearance and manner. Appearance includes the stimuli that convey the nonverbal aspects of role such as gesture, facial expression, posture, and dress (p. 24). Manner reveals attitude; it is the tone of the interaction such as being apologetic, haughty, placating, or optimistic (p. 24).

Despite the fact that the attributes of performance are not entered into the court transcripts, the research about jury decisions emphasizes the importance of appearance and manner to attorneys and witnesses. James Van Camp notes that most attorneys give too little attention to such factors especially with their clients. He claims that jurors pay close attention to "the way he looks, the presence of the family, what he is to do during the course of the trial, and how he is to appear in the courtroom."[30]

Nonverbal theories emphasize the importance of appearance to favorable impressions. These theories indicate that hair, dress, posture, and eye contact affect how perceivers interpret messages.[31] Consider the difference in jury response to two sets of nonverbal cues from two different people who are giving the same testimony--they saw and could identify the accused at the scene of the crime. One witness appears at the trial wearing a business suit, has neatly groomed hair, walks with upright posture, and looks directly at the examiner and the jurors. The other witness wears a halter top and wrinkled skirt, has long and unkempt hair, and saunters nonchalantly up to the witness stand. It is quite clear that the witness exhibiting positive appearance is more likely to be believed than the one who does not.

Manner works interdependently with appearance. Jurors are likely to doubt the testimony of witnesses who fidget, wring their hands, wipe their brow, stare at the floor, and speak hesitantly. Michael Colley reports that jurors lose most of the content information because of the novelty and complexity of the trial process, and yet they maintain the impression left by the witnesses and attorneys.[32] In a juror's autobiographical account of being a member of the Manson trial jury, he remembered more about the appearance and manner of the parties in the case than the content of their interaction.[33]

Appearance and manner are important factors of the trial for the attorneys as well. Kuwin notes that "the experienced trial attorney knows the record." He emphasizes that "the voice volume, tonal qualities--sarcasm, doubt, disbelief, threat. . . . may have their effect on the witness to produce the answers or reactions of the witness." Such behaviors are "observed and considered by the trier of the facts."[34]

The performance of the participants must be congruent with the definition of the situation, character, and role. Additionally, the performance of the members of the defense team must corroborate with each other. Goffman subdivides performance into performance and audience teams. Performance teams are "any set of individuals who cooperate in staging an event" (p. 79). In a courtroom, the prosecution and defense teams are simultaneously staging different dramas. The attorneys and witnesses of the prosecution act as one team, and the attorneys and witnesses of the defense act as the other team. Each set of courtroom performers act as teammates to foster a common impression, that is, belief and commitment to their side's theory of the case. To do this, performers must demonstrate similarity in scripts, style, appearance, and manner.

Audience teams respond to the performance. The audience teams of trial consist of judge, jury, spectators, and press. Audience teams evaluate the facticity, credibility, and appropriateness of the character, roles, and overall performance of the teams. Some members of the audience teams such as press and spectators may, in fact, be sympathetic members of one of the performance teams and directly convey information and action supporting the team with whom their sympathies lie. An attorney or witness who acts out-of-character or who presents a discrepant role may spoil the performance and alter the impression of the audience team about their side of the case.

Staging

A final dramatistic element in the analysis of courtroom examination focuses on the region in which the trial performances are staged and perceived by audience teams (p. 106). Front regions or stages refer "to the places where the performances are given" (p. 107). Witnesses in trials perform frontstage behavior in the courtroom and outside of the courtroom through statements to the press and other observers. The back regions or backstage are the places were witnesses and attorneys can be themselves; these are places where "the impression fostered by the performance is knowingly contradicted" (p. 112). Attorneys and witnesses who appear on frontstage should reflect a joint definition of the situation by presenting their roles in character and by fostering a common and favorable impression of their case

Problems occur in a trial when attorneys or witnesses exhibit backstage behavior in front of members of the audience team. In this case, the performance of the team is spoiled if teammates are observed when they are out-of-character. Such backstage behavior can be observed by audience teams when the participants are outside of the courtroom and when they say or do things contrary to the scripts and the impression they gave during the trial.

The cross examiner can also force witnesses through strategic questions to show backstage behavior in front of the jury and judge. Van Camp warns: "If they /jurors/ see your client do something they just do not think is nice or reflects poorly on his character--messing around with some girl or telling jokes and appearing to think that his trial is a farce--those jurors will not like it."[35] Attorneys and witnesses try to stage their best performance through direct exam and try to spoil the impressions of the opposition through cross exam.

Questioning strategies that help to establish a good impression during direct exam include: using open-ended questions that permit witnesses to tell their own stories, acting interested in witnesses by listening intently to the testimony, and reinforcing the witnesses by affirming nonverbal nods, smiles, and gestures. Cross examiners can lead witnesses into backstage behavior by: avoiding questions that allow witnesses to explain, forcing witnesses to admit information left out of direct exam, acting cool if the witness gives unexpected or damning testimony; and discrediting the reputation and accuracy of the witnesses' previous testimony. While no single question forces backstage behavior, a consistent assault on witnesses may force them to exhibit content, style, appearance, and manner unsuited for the frontstage of the courtroom.

The dramatistic model incorporates the transactional assumptions of Zimmerman; the linguistic and nonverbal concepts of Loftus, Goodman, and Nagatkin; and the dynamic framework suggested by McGovern and Davis. Moreover the model shows how theoretical variables and relationships can be put together with dramatistic assumptions. Thus, the essay combines suggestions of the position papers into theoretical frameworks that could be used for training, consulting, or critical research.

FOOTNOTES

Janice Schuetz is an Associate Professor of Speech Communication at the University of New Mexico, Albuquerque, NM.

[1] Thomas A. Mauet, Fundamentals of Trial Techniques (Boston: Little, Brown and Company, 1980), p. 86.

[2] Robert S. Redmount, "The Transactional Emphasis in Legal Education," Journal of Legal Education, 26 (1974), 261; and Gary S. Goodpaster, "The Human Arts of Lawyering," Journal of Legal Education, 27 (1975), 11.

[3] Erving Goffman, The Presentation of Self in Everyday Life (Garden City, N.J.: Doubleday, 1959) and Forms of Talk (Philadelphia: University of Pennsylvania Press, 1981).

[4] Kenneth Burke, Grammar of Motives (Berkley, CA.: University of California Press, 1962) and Rhetoric of Motives (Berkeley, CA.: University of California Press, 1962).

[5] Sally Jackson and Scott Jacobs, "Structure of Argument in Conversation: Pragmatic Basis for the Enthymeme," Quarterly Journal of Speech, 66 (1980), 251-261 and "Argument as a Natural Category: The Routine Grounds for Arguing in Conversation," Western Journal of Speech Communication, 45 (Spring, 1981), 118-132.

[6] Robert P. Abelson, "Modes of Resolution of Belief Dilemmas," Journal of Conflict Resolution, 3 (1959), 343-52 and William J. McQuire, "Personality and Susceptibility to Social Influence," The Process of Social Influence, ed. Thomas D. Beisecker and Donn W. Parson (Englewood Cliffs, N.J.: Prentice-Hall, 1972), 122-160.

[7] Herbert C. Kelman, "Processes of Opinion Change," Public Opinion Quarterly, 25 (1961), 58-78.

[8] J. Vernon Jensen, Argumentation: Reasoning in Communication (New York: D. Van Nostrand, 1981), pp. 175-92.

[9] Wayne Brockriede, "Arguers as Lovers," Philosophy & Rhetoric, 2 (1972), 1-11.

[10] Ronald J. Matlon, "Bridging the Gap Between Communication Education and Legal Education," Communication Education, 31 (January 1982), 39-53 and David M. Hunsaker, "Law, Humanism and Communication: Suggestions for Limited Curricular Reform," Journal of Legal Education, 30 (1980), 417-32.

[11] Edwin Chen, "Trial by (Shadow) Jury," Extra (January 1982) 60-67. This essay explains some of the rewards and problems of being a trial consultant.

[12] I believe the consultant often acts in the role of critic and critics analyze and evaluate according to criteria that come from theoretical frameworks.

[13] A survey of the critical perspective of dramatism is found in: Bruce E. Gronbeck, "Dramaturgical Theory and Criticism: The State of the Art or (Science)?" Western Journal of Speech Communication, 44 (Fall 1980), 315-330.

[14] Georg Simmel, "The Dramatic Actor and Reality," in James E. Combs and Michael W. Mansfield, Drama in Life: The Uses of Communication in Society (London: Oxford University Press, 1968), pp. 52-4.

[15] Combs and Mansfield, "Preface," p. xviii; and Kenneth Burke, "Dramatism," in The International Encyclopedia of Social Sciences, ed. David Sils, VII (New York: Macmillan Publishing, 1968), pp. 445-451.

[16] Hugh D. Duncan, Communic-tion and Social Order (London: Oxford University Press, 1962; rpt. 1970), p. 5 and Symbols in Society (London: Oxford University Press, 1968), pp. 52-4.

[17] Goffman, The Presentation of Self in Everyday Life. Subsequent references from this source will appear in parentheses immediately following the cited material.

[18] Herbert A. Kuvin, Trial Handbook (Englewood Cliffs, N.J.: Prentice-Hall, 1965), p. 127.

[19] Kuvin, p. 173 and p. 211.

[20] Al J. Cone and Vernon Lawyer, The Art of Persuasion in Litigation (Des Moines, IA: Dean Hicks Co., 1966, ch. 5.

[21] Kuvin, ch. 7

[22] Mauet, pp. 85-98.

[23] These qualities parallel the concept of credibility developed in the classical literature of Aristotle, The Rhetoric and Cicero, De Oratore where they explain this proof as "ethos." Goffman uses the term to relate to consistency of character as revealed through verbal and nonverbal cues.

[24] Mauet, ch. 4; Kuvin, ch. 8; and Kenny F. Hegland, *Trial and Practice Skills* (St. Paul, MN: West Publishing, 1978), ch. 2.

[25] Mauet, ch. 6; Kuvin, ch. 9; and Hegland, ch. 4.

[26] Morton Cooper, "The Impressive Voice in the Courtroom," *Trial*, 15 (July 1979), 53.

[27] John M. Conley, William M. O'Barr, and E. Allan Lind, "The Power of Language: Presentational Style in the Courtroom," *Duke Law Journal*, 6 (January 1978), 1375-1399.

[28] Cone and Lawyer, ch. 11.

[29] Kuvin, ch. 7

[30] James Van Camp, "Preparing the Criminal Case," *Trial*, 14 (1978), 40.

[31] Mark L. Knapp, *Nonverbal Communication in Human Interaction* (New York: Holt, Rinehart, Winston, 1972).

[32] Michael F. Colley, "Friendly Persuasion: Gaining Attention, Comprehension and Acceptance in Court," *Trial*, 17 (1981), 43.

[33] William Zamora, *Trial By Your Peers* (New York: Maurice Girodias, Assoc., 1973).

[34] Kuvin, p. 11.

[35] Van Camp, 40.

RESPONSES TO DIRECT AND CROSS-EXAMINATION PROGRAM

Robert Nofsinger: You mention that rules of direct and cross-examination are not necessarily the same as everyday conversational rules. I have to disagree. I've been examining direct and cross-examination for the past three or four months and I find that there is conversational-type control exercised by witnesses. For example, I've seen an expert witness say several times that he didn't understand the question. The attorney repeated it and the expert said again he didn't understand it. Once again, they went through what they had gone through before and again he said he didn't understand the question. The lawyer gave up and didn't press it. An answer never was given to that particular question. I inferred that witness really didn't understand the question. I thought I understood it and knew the answer to it. I also believed an answer would have helped counsel's case, so I assume the witness really didn't understand. In any case, he got out of answering it. In another case, a non-expert witness got out of answering a question by objecting that it had a statement presupposition, that it assumed something that wasn't true. She essentially said, "I know what you are getting at, but there is false assumption in there and I won't respond to something that's not correct." Perhaps the judge could have ordered her to respond but, in fact, the rules of trial procedure were not invoked in that way. So, I think there are conversational rules and norms that are still operating in the courtroom that both lawyers and witnesses can use to exercise some kind of conversational control.

Francis McGovern: When I am trying to determine whether or not I want to hire someone as an expert, I want someone who can do just as you suggest, that is, knows how to avoid the question. There is also the classic case of our expert who sucks in the opposing counsel to ask him a particular question which he wants to answer and which could be devastating to the lawyer. Yes, there is a tremendous amount of witness control over a lawyer and vice-versa.

Leroy Tornquist: I think what Gerry Miller did in Ohio and Michigan with videotaped trials is exactly the kind of thing we ought to be looking at. I think we ought to look at videotape for depositions. We ought to look at ways to reduce the amount of cost in the present system. So many people are denied access to the system because of cost. I think research can be done on ways to reduce these costs.

Francis McGovern: In the asbestos field, some 20,000 cases have been filed. In the Northern district of Ohio, I have been asked to develop a management plan for handling asbestos cases. The cases which have been tried there take about an average of six weeks each. It is my opinion that an asbestos case could probably be tried very fairly in a week or even in three days. It depends in large part on the kind of information that people like you can give us to facilitate the process. For example, if we use videotaped depositions which are telescoped so that they are very concise, what effect does that have on the trial of a case? Can we still have a fair trial or is there something about the length of the examination of witnesses which is necessary? I think that judges are quite interested, not only in the cost factors, but in the communication factors involved in any attempt to shorten the trial process.

Thomas Mauet: I want to urge all of you who are in current research to do one thing. I think it would be a good idea if, when you calculate your research ideas, you cultivate people like Leroy Tornquist or myself or any of the other trial lawyers who are interested in what you do. I have never in my life yet been approached by anyone in the psychology or communication field to ask me if this thing which they find theoretically and academically interesting has a utility to those persons doing trial work as well. There are things that have theoretical interest that may or may not be highly utilitarian. I urge all of you to start thinking about touching base with the trial lawyers out there. Additionally, whenever you decide to publish, get those things into legal journals. I urge you to look at the legal journals and law reviews. If people in your line of work can get just one law review article published by a nationally recognized law school, think of what you can do with 170 or so American Bar Association approved law schools. I think the interest is there and I urge you folks in speech communication to look to those places for publication because that is where trial lawyers, and those interested in your legal services, will find out about your research.

Gerald Miller: I want to make a challenge to all of you. There is a disquieting saneness about this meeting that parallels a number of others I have attended. We have had the obligatory essays about the kind of research we ought to be doing. We've had several periods of ritualistic self-flagellation of the field for our brothers and sisters in such prestigious areas as social psychology and sociology. So they would all understand that, indeed, we are a second-rate discipline and we have brought nothing forward to contribute. I guess my feeling is that maybe it is time to start thinking about another conference. That conference ought to be a year hence and it ought to be a conference with pre-planning where you bring people together, not to talk about research that ought to be done, but to bring people together as research teams to plan and begin the preliminary execution of research. I guess what I have in mind is the possibility that some of these topics that have been discussed here, some of the kinds of things mentioned in the presentations, could immediately become research projects. I don't know what the areas would be, but someone would be able to identify some set of people who ought to be at that conference. You would attend the conference and immediately map out a program of research. After a couple of days of that, then you could come together and share with each other the research programs mapped out, and then people would go off and begin to do that research. It seems to me that is the way to go to provide the data. Unless those sorts of things begin happening, we will assemble again in 1985 and still be discussing the kinds of research that ought to be going on. We need research that involves not only communication scholars, but, to have research with maximum utility we need to include those individuals in the legal profession that can provide us with the necessary realism.

OPENING STATEMENTS AND CLOSING ARGUMENTS

PROGRAM COORDINATOR
PROGRAM CHAIRPERSON

K. PHILLIP TAYLOR
DEPARTMENT OF COMMUNICATION
UNIVERSITY OF CENTRAL FLORIDA

REVIEW OF RESEARCH ON OPENING STATEMENTS AND CLOSING ARGUMENTS

William L. Benoit

John S. France

Scholarly activity in the area of opening statements and closing arguments can be found in two broad categories of periodicals: social science journals and legal journals. The former consists almost exclusively of empirical research while the latter includes virtually no emperical studies, so this breakdown is a useful one. Hence, it will be the basis for the organization of this essay.

Social Science Literature

The earliest study investigating jurors' reactions to opening statements or closing arguments was conducted by Weld and Danzig in 1940. Surprisingly, in the forty-plus years which have elapsed since that article appeared, less than twenty other empirical studies have been published in this area of inquiry. This is particularly striking given the fact that this initial effort concluded that, "The opening and closing statements were important" factors influencing the jurors' decisions,[1] indicating that this was indeed a fruitful area for study. This section of the review will discuss the findings of these studies (including methodological issues).

In the pioneering study completed by Weld and Danzig, three mock juries were exposed to opening statements, direct and cross-examination of three witnesses each for the plaintiff and the defendant, and closing arguments. Jurors noted how certain they were that the defendant was liable after each segment, revealing how their attitudes fluctuated with each communication. They conclude that "Some opinions were formed on the basis of opening statements. In some cases a decision was reached early in the trial and all subsequent evidence was interpreted in light of that decision."[2] Some jurors who did not form this opinion on this basis were influenced strongly by the closing argument: "The summing up by the defendant's counsel was the most effective stage of the entire trial,"[3] creating the largest shift in median opinions.[4] This study suggests that both opening statements and closing arguments have the potential to significantly sway jurors' decisions.

Questions are raised by this design. First, actual jurors are not asked to commit themselves about the defendant's liability until the end of the trial. Research has shown that public commitment to an attitude tends to make that attitude resistant to future persuasion.[5] Forming and reporting a judgment about liability, especially when done repeatedly, could alter their reactions to subsequent persuasive communications. Furthermore, only one set of messages was employed in the study, permitting no comparisons between experimental conditions. Although the study suggests that opening and closing statements can influence jurors' verdicts, we have no idea how or why they do so. For example, why was the defense's summation so much more persuasive than the plaintiff's corresponding speech? So, this study reveals that opening and closing speeches are influential, justifying further investigation, but tells us litte beyond that.

Two recent studies focused exclusively on the opening statements, following up on Weld and Danzig's suggestion that they create an interpretive framework. Pyszczynski and Wrightsman tested the effects of the extensiveness of this speech on mock jurors. The only condition favorable to the defense occurs when a brief prosecution statement is followed by an extensive defense statement. Two brief opening statements favor the prosecution, while an extensive prosecution effort followed by a brief defense speech is more favorable to the prosecution. Two extensive opening statements resulted in an even higher proportion of guilty verdicts.[6] The authors suggest that "jurors were heavily influenced by the first strong presentation they read."[7] However, this does not account for the fact that a) two brief opening statements favored the prosecution and b) more guilty verdicts were created by two extensive statements than by an extensive prosecution statement and a brief defense effort.

These results could easily be accounted for in at least three ways. First, the rest of the trial (testimony and closing arguments) could have favored the prosecution. Second, a primacy effect could be present, whereby in otherwise equal situations (both extensive or both brief), the first opening statement is most effective (the prosecution's opening statement was first). Third, a recency effect could be present, whereby when the opening statements are balanced, the last closing argument is most effective (the prosecution has the last closing argument). While the reason for these results in the case of balanced opening statements in not apparent, there is no question that when one opening statement is substantially more extensive than the other, it can affect the ultimate verdict, adding support to Weld and Danzig's conclusions.

The second investigation of opening statements addresses a much more specific question--what are the effects on jurors' verdicts of promising that subsequent testimony will be stronger than it in fact is? Since the outline of your case in the initial statement can positively affect the jurors' interpretation of subsequent testimony, an opening statement which portrays the case as decidedly in that attorney's favor might cause the jurors to interpret the case in just that fashion. Pyszczynski, Greenberg, Mack, and Wrightsman found that opening statements which promised that the evidence was stronger than it actually was created more lenient verdicts than control statements with no such promise.[8] However, when the prosecutor's closing argument draws attention to the fact that the defense's evidence failed to prove what had been promised, juror verdicts were more harsh than without such reminder.[9] Attorneys who promise more in an opening statement that their evidence can show may help their clients, but risk hurting them if their opponents expose this strategy. Although not designed to do so, this study incidently reveals an important use of closing arguments: they can effectively counteract the strategy studied here.

A number of studies have investigated primacy and recency in persuasion using the trial as the basis for the competing communications. Stone found a clear primacy effect: two-thirds of the mock jurors reached the same final verdict as their initial judgment.[10] He counterbalanced the two communications (half of the subjects heard the prosecution first, and half heard the defense first) in order to avoid any confounding effect of side and position.

This study has certain design features which limit its generalizability. First, more than two speeches were employed in each condition (a. prosecution, defense refuting prosecution and supporting defense, prosecution; b. defense refuting prosecution, prosecution, supporting defense, prosecution).[11] This situation never occurs in a trial (condition b. included argumentation and testimony in the first two messages, so it did not simulate two opening statements and two closing arguments). Second, the messages were specifically designed to contain no conflicting testimony or attacks on credibility.[12] Again, the absence of conflicting testimony and of attacks on credibility does not characterize all trials. Furthermore, the discussion of the communication suggests (it is not very specific on this point) that there was no direct or cross-examination of witnesses; rather, exerpts from the "testimony" were included in the prosecution and defense statements. The fact that jurors were not exposed to the individual witnesses on the stand, or to the attorneys' questioning tactics, may be another difference between this study and actual trials.

Three studies found consistent recency effects. Zdep and Wilson investigated the effects of distracting material (speeches from a different trial) on juror verdicts. They employed "exerpts" from both the opening statements and closing arguments in an actual trial. While they found that the distraction had no effects on results, a recency effect was observed.[13] Walker, Thibout, and Andreoli found recency effects in three out of four trials.[14]

Another study documenting recency effects takes as its point of departure a design flaw found in some of the research in this area. The messages employed in an earlier study were scrutinized.

> The defense statement seemed weak when it came first because it contained few or no facts about the case. In the normal jury trial the prosecution makes its opening statement first, so that a statement of facts by the defense in its opening statement would be redundant. However, in order effect experiments the communications must be counterbalanced, prosecution coming first for some groups and defense first for the other groups. In this case, the order with the defense arguments first might seem to disfavor the defense argument since its omission of details might make it weak in this position. The result might be that the prosecution argument would be more persuasive when in the second position and produce an artifactual recency effect.[15]

Accordingly, the authors revised the defense speech to strengthen it. Recency effects occur in ten out of ten trials (five replications with original messages, five with strengthened defense speech), a point which the authors highlight: "the most convincing indication of reliability is the simple fact that recency occurred in 10 instances out of 10."[16] However, inspection of the group means reveals an effect which makes these results questionable. While the strengthened defense speech helped the defendant in each of the prosecution-defense conditions, which is easily understandable, a strengthened defense created more guilty verdicts in the defense-prosecution condition four times out of five.[17] The authors cannot adequately account for this effect, which runs completely counter to expectations.

Several investigations have attempted to determine the effects of the timing of speeches and the final verdict on jurors' decisions. Miller and Campbell combined opening statements, direct examination of their own witnesses, cross-examination of opposing witnesses, and closing arguments into two messages, one for the plaintiff and one for the defendant.[18] They found a recency effect when a one-week interval separated the two communications, a primacy effect when the final verdict was delayed a week after contiguous statements and neither recency nor primacy when there was no delay or when there was delay both separating the two communications and between the communications and the final verdict.[19] Using summaries of defense and prosecution arguments without conflicting testimony or attacks on credibility, Insko confirmed the recency effect when the two communications are separated, but not the primacy effect when the measurement is delayed.[20] Wilson and Miller used seven-minute exerpts from the opening statements and closing arguments of the two attorneys used in Miller and Campbell's study.[21] They found recency effects in nine of twelve conditions, although it was less significant when the measurement was delayed. Recency effects were no stronger when the two communications were separated by an interval.[22]

It is difficult to compare these three studies or to generalize them to actual trial practice. Miller and Campbell lumped all plaintiff communications and all defendant communications together, instead of alternating them, as is the case in a trial. Insko used only exerpts from opening and closing statements, and included no conflicting remarks or credibility attacks, differing from both trials and from Miller and Campbell. Wilson and Miller used brief exerpts from Miller and Campbell's opening statements and closing arguments.

The results present no clear pattern. The initial study found greater recency effects with an interval between communications. Insko confirmed this result, but the third study did not. The first study found a primacy effect when the final verdict is delayed. Insko did not find a primacy effect, while Wilson and Miller found partial confirmation in a smaller recency effect.

Another group of three studies investigated the effects of one-sided versus two-sided communications. It must be noted that in the context of these studies, "two-sided" does not mean "impartial," or "pro-con." The two-sided communication develops arguments in support of the author's position, as does a one-sided communication, but it continues on to mention and then attack or refute arguments of opponents. The other side of the question is not treated impartially, and the audience is not left to draw its own conclusions.

Insko devised one- and two-sided messages for both the prosecution and defense, apparently intended as closing arguments.[23] He found no order effect for two one-sided or two two-sided communications, a recency effect for a one-sided followed by a two-sided communication, but no effect for a two-sided followed by a one-sided speech.[24] Because the last finding was contrary to predictions, a second experiment was conducted which made the subjects aware of the issues in the case presented. This experiment confirmed the first findings and reversed the last one, documenting a primary effect for a two-sided followed by a one-sided speech.[25] Thus, two-sided presentations are more effective when the audience is familiar with the issues. Lawson reviews some of the research on one- and two-sided messages, relying heavily on Insko, and speculates on applications in appellate oral argument and closing argument in jury trials.[26]

The other two studies exposed subjects to either a one- or a two-sided message (but not both) described to them as a summary of the prosecution's case prepared by a law student from the entire trial transcript.[27] Jones and Brehm found that while a one-sided appeal is more effective than a two-sided one, the effectiveness of the former but not the latter is reduced when the subjects are told beforehand that there are two sides to the issue ("this is not an open and shut case.")[28]

Dipboye's study was more complex, dividing half of the subjects into unfamiliar (no prior information) and familiar (read a three page chronological summary of evidence) conditions. Each of these groups was further divided into accuracy ("this research studies how accurately jurors process information and make decisions") and persuasion ("this research studies how much jurors are influenced by attorney arguments") contexts. Furthermore, the subjects assigned to these four conditions read either the one-sided or two-sided message. The only finding which was statistically significant was that one sided appeals are more effective for unfamiliar subjects in an accuracy context.[29]

Attorney language use in criminal trials was investigated by Parkinson. He found that the language of successful prosecutors was characterized by "verbal assertiveness." Such attorneys "spoke longer, asked more questions referring directly to the witness, and made more indicative statements." Unsuccessful prosecutors "used more polite forms, more hypercorrect grammar, and more conditional statements."[30] Successful defense attorneys employed "abstract or ambiguous language...-

fewer adverbs...more legal jargons and fewer affect words. Defense attorneys who were not successful "used more demonstratives and grammatically complete speech to increase their clarity."[31] Interestingly enough, Parkinson relates these differences in language characteristics to the attorneys' legal tasks--e.g., in a criminal case the defense must (at least) create a reasonable doubt, and abstract or ambiguous language and legal jargon can create that doubt.[32] However, as the second trait of successful prosecutors indicates, this study included samples of all attorney communications, not just opening and closing arguments. Further, given Parkinson's functional explanation for these results, they probably cannot be generalized to civil trials.

The implications of the aforementioned research for the law deserve comment. Much of this research does not appear to be aimed at investigating opening statements and closing arguments, even though in one form or another each study employs messages based on them. Rather, they seem designed to study issues of relevance and persuasion generally, and they happened to pick trial or pseudo-trial formats as a vehicle to that end. Several considerations support this observation. Although the experimental messages may appear "trial-like" to the ordinary subject, in fact wide discrepancies exist between some of these approaches and actual trials. Several studies designed their messages so that evidence did not directly conflict and so that no attacks on credibility were present. Many studies integrated testimony into attorney statements. One study had three speeches in a row in one condition and four in a row in the other. Despite the fact that trials do recess, rarely is there a week either between the two closing arguments or between closing argument and the request for a jury verdict. One study rewrote defense opening statements so they could appear before the prosecution's speech. In fact, in one study, "It was emphasized to all subjects that they were not to try to imagine that they were jurors in the case."[33] These pseudo-trial formats were useful for investigating primary/recency or one- versus two-sidedness in persuasion because they provided an easily understandable reason for two (or more) opposed communications, but they limit the studies' usefulness when predicting the persuasive impact of communication in actual trial settings.

It is not clear, for reasons other than experimental design, that the results of some of these studies have applicabilty in the courtroom. The nature of the adversary system assures that trials always occur within a "persuasion" and not an "accuracy" context. Furthermore, jurors should be unfamiliar with the case before opening statements (to avoid bias) and familiar with it prior to closing arguments (after hearing the opening arguments and testimony). One way to put such research into context is to mention one study of trial communication not yet discussed. Rosnow, Holtz and Levin investigated such factors as familiarity and primacy/recency, reinforcement, and other variables.[34] They found that the most important variable was strength of argument, which is to say that the stronger case is likely to win even if the argument is first in a situation where recency prevails.

This is not to suggest that all of this research is subject to all of the above criticism. The first three studies most closely resembled an actual trial. The study of language usage employed transcripts of actual trials for its data. The other studies probably lie on a continuum, with some of more relevance and usefulness than others; and the brief discussions of method and limitations presented here are designed to make that claim.

We offer the following summary of results:

> Opening statements and closing arguments significantly influence some jurors' verdicts.
>
> The prosecution is strengthened by an extensive opening statement; the defense is strengthened by an extensive opening statement when the prosecution's initial speech is brief.
>
> Attorneys' cases are more effective when they promise to prove more than they can in the opening statement unless their opposition draws attention in summation to their failure to fulfill this promise.
>
> Although not consistent, more studies find recency than primacy effects.
>
> No consistent effects of delay on primacy and recency have been demonstrated.
>
> Two-sided approaches are more effective in an adversarial situation, especially if the audience is familiar with the issues of the case.
>
> Successful prosecutors are verbally assertive.
>
> Unsuccessful prosecutors are polite, grammatical and conditional.
>
> Successful defense attorneys are abstract and ambiguous.
>
> Unsuccessful defense attorneys are specific and clear.

Legal Literature

There are basically four types of articles on opening and closing arguments in the legal publications. The first type of article discusses what is permissible and not permissible by law in opening and closing arguments.[35] The second type of article are merely examples of opening and closing arguments with perhaps an introduction or conclusion.[36] The third type of article consists of thoughts, attitudes, and suggestions taken from the experience of and made by their authors. These articles make only slight reference or no reference to the social science literature with no express attempt to bring that literature to bear on the subject matter.[37] This section of the paper will not discuss the articles in the first three categories, but will focus instead on those articles which interface with the social science literature and attempt to bring it to bear on the considerations of attorneys in opening and closing arguments.

The articles which attempt to bring the social science literature regarding opening and closing statements into perspective for the attorney seem to follow a pattern exemplified by the most recent article of this nature entitled, "The Opening Statement: Structure, Issues, and Techniques" by M.F. Colley in Trial magazine. In this work, Mr. Colley deleniates some of the research done in the social sciences on the issue of opening statements.[38] Although Colley is generally accurate, certain inaccuracies and shortcomings must be pointed out. As other authors of this type of paper in the legal journals do, Colley tends to rely on popular publications such as Nierenberg and Calero, How To Read A Person Like A Book[39] and J. Malloy, Dress for Success as references rather than citing the original research.[40] Colley also misconstrues certain studies. For instance, he cites without footnote to a Dr. Albert Nehrabian (sic), as follows:

> According to Dr. Albert Nehrabian [sic], a highly respected research psychologist: Only seven percent of the total persuasion message in a courtroom is verbal, reflecting the contents of the words used. Another thirty-eight percent is vocal including voice, pitch, volume, intonation, speed and inflection. The remaining fifty-five percent of the total message is non-verbal and non-vocal, including posture, body movements, facial expressions, and such factors as clothing.[41]

Colley is in all likelihood referring to Dr. Albert Mehrabian, who did a study published in 1967. Dr. Mehrabian was not addressing a courtroom situation and gathered his data from subjects who evaluated a speaker after hearing one spoken word. The study concluded that total impact equaled .07 verbal plus .38 vocal plus .55 facial. Mehrabian later interpreted these findings to mean that total feeling is equal to seven percent verbal feeling plus thirty-eight percent vocal feeling plus fifty-five percent facial feeling.[42] It is to say the least stretching this research to generalize to the point where Colley states that it is Dr. Mehrabian's position that, "Only seven percent of the total persuasion message in a courtroom is verbal, reflecting the content of the words used."[43]

Despite these shortcomings, Colley introduces the reader to several concepts in the persuasion area which are well documented in the literature of social psychology. For instance, Colley considers primacy effects, citing the Chicago jury research study, which determined that eighty percent of all jurors made up their minds on the issue of liability after opening statements and do not thereafter change their minds.[44] Colley also talks about synthesia (the readiness or predisposition of a juror to respond to evidence), the Zeigarnik effect (the idea that jurors will retain some information better when it is purposely delayed), autistic or idiosyncratic perception (jurors limit or adjust their perceptions to fit their own personal needs and values), and repetition.[45] Colley cites studies, again without footnote, of Dr. Elizabeth Loftus which indicate that the choice of words make a difference in perception. Colley also quotes Dr. Robert Lawson and a review of impression formation research.[46] Finally, Colley discusses the principle of visual persuasion, indicating that visual aids are better than sound alone.

Arthur, in his article "How to Use Speech Principles to Persuade on Opening Statement,"[47] also quotes the Chicago study cited by Colley for the proposition that eighty percent of jurors make up their minds on the issues of liability on opening statements.[48] Arthur discusses identification indicating generally that it may be achieved by dress, non-verbal, the use of action words and sentence structure. He emphasizes that the jury should identify with your client rather than the defendant before the opening statement is concluded.[49] The article then gives various examples of how identification is achieved. Arthur also mentions, without great elaboration, the concepts of primacy and recency, making the point that recency is only ease of memory whereas primacy tends to affect what we believe as well as what we remember.[50]

The concepts of identity and primacy are also discussed in R. Begam "Opening Statements: Some Psychological Considerations" in the July 1980 Trial magazine.[51] This article explains identity using examples such as the "dart" case where a child is injured when he "darts" in front of an automobile. The author states that ninety percent of these cases are lost by the plaintiff and attributes this to the jury identifying and being drivers and not children. This article does not quote any research to support its views on identity or primacy and has no citations. With regard to primacy, it does indicate the University of Chicago study which this article also claims reveals that "eighty percent of all jurors make up their minds on the subjects of liability and never change their minds after the opening statement." This article also quotes in the text and cites Robert Lawson's experimental research on the organization of persuasive argument, "An Application to Courtroom Communication" and discusses some of the word order studies done in that article.[52] Despite the shortcomings of this article, particularly with regard to citation, it does have good discussions on primacy and identity complete with quotations from Cicero.[53]

Perhaps the two best articles written in legal periodicals which describe social science research in the areas of courtroom persuasion in opening and closing arguments are "Commentaries, Persuasion in the Courtroom" written by Costopoulos in 1972,[54] and an article by Lawson entitled "Experimental Research on the Organization of Persuasive Arguments: An Application to Courtroom Communications".[55]

Costopoulos does a good job of bringing social science research to bear on the problems in the courtroom and despite what purists would regard as certain problems, such as quoting Aristotle according to Striker,[56] this is by far the best article found in the legal literature which brings social science to bear on these problems. Costopoulos begins by talking about credibility of sources and persuasiveness citing research done by Sherif and Nebergall.[57] Costopoulos also considers the work done by Insko which has previously been discussed in this article.[58] In his section on the order of presentation, Costopoulos discusses the principle of primacy as first set forth by F. Lund and its subsequent modification and partial repudiation by H. Cromwell. Lund found that when students receive both sides of an issue, the side presented first consistently has an advantage over the side presented last (primacy). H. Cromwell, however, pointed out that Lund overstated his law and that the law of primacy was replaced by the law of recency, i.e. the tendency of humans to remember best that which they have heard last.[59] Costopoulos then goes into an extensive review of when primacy applies and when recency applies. He concludes that primacy is applicable with nonsalient controversial topics or interesting subject matter or highly familiar issues. Recency was most strongly demonstrated when the topics were salient or the subject matter uninteresting or where the issues were moderately unfamiliar.[60] Costopoulos then applies these conclusions to opening and closing arguments. Costopoulos indicates that the closing argument is important due to the law of recency and that particular attention should be paid to recency bound information (that is information which is salient, uninteresting and complex).[61] This view tends to be simplistic and ignores the other reasons why closing argument is important, (e.g. this is the only time in which an emotional appeal can be expressly delivered to the jury). Costopoulos' article is by far the most complete article examining principles of persuasion on communication to explain factors in the opening and closing argument.

Like Costopoulos' article, Robert G. Lawson does not limit his article to opening and closing argument. However, much of what he says is applied to opening and closing argument by him. Lawson discusses inoculation theory and McGuire's work on inducing resistance to persuasion by stating and refuting the argument before the opposition states it.[62] Lawson concludes that refutational immunization is desirable in the lawyers' speeches on both opening and closing argument.[63] Lawson indicates that there is a definite superiority of two-sided communication as opposed to one-sided communication for both sides in arguing to the jury.

The second part of Lawson's paper describes an experiment where two groups are given the description of an individual. One group is told that the individual is intelligent, industrious, impulsive, critical, stubborn and envious. The second group is told that the individual is envious, stubborn, critical, impulsive, industrious and intelligent. Group one concluded that the individual was an able person with some unimportant shortcomings. Group two concluded that he was an individual with serious difficulties. Lawson concludes that the order of presentation seems to be important in the effectiveness of the persuasion of ideas communicated.[64] The third section of Lawson's paper described an experiment by Lund indicating the primacy principle.[65] Although Lawson examines the research quite carefully, he does not bring the reader to any conclusions and his article is not nearly as specific in applying the conclusions of the research to the art of opening and closing as Costopoulos.

Although some articles have tried to bring the studies on persuasion done by the social sciences to bear on opening and closing arguments, there have been no effective articles written since the early seventies in this category. Since much has happened in this area complete review of these studies and their application of them to opening and closing arguments would be appropriate.

CONCLUSION

Relatively little empirical research has been conducted on opening statements and closing arguments. Some of this research was not designed to optimally represent courtroom communication, which is understandable, since most social science researchers are not trained in the nuances of the legal process. The results of these studies are summarized at the end of the first section, and suggest that this is a fruitful area for further inquiry.

As sparse as these results are, they rarely find their way into the legal literature. When they do, they may be misinterpreted, which is also easy to understand, given the fact that most legal scholars are not trained in evaluating the limitations of this research. These works are discussed in the second section, and indicate a healthy interest in this material on the part of the legal profession.

It may be apparent at this point that our review has led us to make the following recommendation: social science researchers and legal scholars should work together, for each has something to offer the other. The legal scholar can offer suggestions to the social science researcher both on what to study (what findings would be useful to attorneys) and on the design (to assure that results are generalizable to courtroom communication). The social science researcher can help conduct this research and to interpret these findings appropriately.

NOTES

William L. Benoit, Assistant Professor, School of Speech Communication, Bowling Green State University; John S. France, member Ohio and Michigan Bar, partner in law firm of Shinkle, Shinkle and France

[1] H.P. Weld and E.R. Danzig, "A Study of the Way in Which a Verdict is Reached by a Jury," American Journal of Psychology, 53 (October 1940), 536.

[2] Ibid.

[3] Ibid., p. 531.

[4] Ibid., p. 529.

[5] M. Deutsch and H. Gerard, "A Study of the Normative and Informational Social Influences upon Individual Judgment,", Journal of Applied Social Psychology, 51 (1955) 629-36; C.I. Hovland, E. Campbell, and T. Brock, "The Effect of 'Commitment' on Opinion Change Following," Order of Presentation in Persuasion (New Haven: Yale University Press, 1957), pp. 23-32; A.R. Cohen, J.W. Brehm, and B. Latane, "Choice of Strategy and Voluntary Exposure to Information Under Public and Private Conditions," Journal of Personalty and Social Psychology, 27 (1959), 63-73.

[6] Thomas A. Pyzczynski and Lawrence A. Wrightsman, "The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial," Journal of Applied Social Psychology, 11 (1981), 306.

[7] Ibid., p. 309.

[8] Tom Pyszczynski, Jeff Greenberg, Dave Mack, and Lawrence S. Wrightsman, "Opening Statements in a Jury Trial: The Effect of Promising More than the Evidence Can Show," Journal of Applied Social Psychology, 11 (1981), 440.

[9] Ibid., p. 441.

[10] Vernon A. Stone, "A Primacy Effect in Decision-Making by Jurors," Journal of Communication, 19 (September 1969), 246.

[11] Ibid., pp. 243-44.

[12] Ibid., p. 244.

[13] Stanley Zdep and Warren Wilson, "Recency Effects in Opinion Formation," Psychological Reports, 23 (1968), 199.

[14] Laurens Walker, John Thibaut, and Virginia Andreali, "Order of Presentation at Trial," Yale Law Journal, 82 (1972), 219.

[15] William Wallace and Warner Wilson, "Reliable Recency Effects," Psychological Reports, 25 (1969), 313.

[16] Ibid., p. 315.

[17] Ibid., p. 314.

[18] Norman Miller and Donald T. Campbell, "Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements," Journal of Abnormal and Social Psychology, 59 (1959), 3.

[19] Ibid., p. 4.

[20] Chester A. Insko, "Primacy Versus Recency in Persuasion as a Function of the Timing of Arguments and Measures," Journal of Abnormal and Social Psychology, 69 (1964), 382, 384.

[21] Warner Wilson and Howard Miller, "Repetition, Order of Presentation, and Timing of Arguments and Measures as Determinants of Opinion Change," Journal of Personality and Social Psychology, 9 (1968), 185.

[22] Ibid., pp. 187-88.

[23] Chester A. Insko, "One-Sided Versus Two-Sided Communications and Countercommunications," Journal of Abnormal and Social Psychology, 65 (1962), 203-04.

[24] Ibid., p. 204.

[25] Ibid., p. 205.

[26] Robert G. Lawson, "Relative Effectiveness of One-Sided and Two-Sided Communications in Courtroom Persuasion," Journal of General Psychology, 82 (1970), 3-16.

[27] Russell A. Jones and Jack W. Brehm, "Persuasiveness of One- and Two-Sided Communications as a Function of Awareness There are Two Sides," Journal of Experimental Social Psychology, 6 (1970), 51; Robert L. Dipboye, "The Effectiveness of One-Sided and Two-Sided Appeals as a Function of Familiarization and Context," Journal of Social Psychology, 102 (1977), 127.

[28] Jones and Brehm, pp. 52-53.

[29] Dipboye, p. 128.

[30] Michael G. Parkinson, "Verbal Behavior and Courtroom Success," Communication Education, 30 (1981), 29.

[31] Ibid, 31.

[32] Ibid.

[33] Jones and Brehm, p. 51.

[34] Ralph L. Rosnow, Robert F. Holtz, and Jack Levin, "Differential Effects of Complementary and Competing Variables in Primacy- Recency," Journal of Social Psychology, 69 (1966), 145-46.

[35] See e.g., L. Greene, "Submission of Issues in Negligence Cases," University of Miami Law Review, 18 (1963) 30.

[36] See e.g., E. Hornsby, "A Summation for Plaintiff in a Fraud Case," Alabama Lawyer, 40 (1979), 91-103; E. Blake, "Trial Tactics Demonstration Closing Argument in a Death Case," Federation of Insurance Counsel, 17 (1966-67), 16-36; G. Eggert, "Richard Olney: Summation for the Defense, American Journal of Legal History, 13 (1969), 68-84; B. Sears, "Conspiracy--Final Argument for the Prosecution," Trial Lawyers Guide, 10 (1966), 63-93.

[37] The third type of articles are examples of the authors' views about opening and closing arguments with little comment on the studies done in the social sciences. These articles do give some good practical advice on opening and closing arguments and we have attached a bibliography of them to this paper.

[38] M.F. Colley, "The Opening Statement: Structure, Issues, Techniques," Trial, 18 (1982), 53-57.

[39] Ibid., note 3.

[40] Ibid., note 4.

[41] Ibid., p. 53.

[42] A. Mehrabian and S.R. Ferris, "Inference of Attitudes from Nonverbal Communication in Two Channels", Journal of Consulting Psychology, 31 (1967), 248-52. See also L. Malandro and L. Barker, Nonverbal Communication, (Reading, MA: Addison Wesley, 1983), 278.

[43] Colley. The overgeneralization of this research is not limited to legal periodicals, for Malandro and Barker report that this forumla is "often quoted to show the relationship between verbal and facial sources of information," although this interpretation is inappropriate (Malandro and Barker, p. 278).

[44] The author was unable to find this result in the study cited by Colley and other authors for this proposition.

[45] Colley, p. 54.

[46] Ibid., pp. 54-55. Colley is probably referring to: E.F. Loftus and J.P. Palmer, "Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory," Journal of Verbal Learning and Verbal Behavior, 13 (1974), 585-89. See also text at note 26 for the Lawson article he probably employed (Lawson does not conduct an experiment as Colley's wording suggests).

[47] R. Arthur, "How to Use Speech Principles to Persuade in Opening Statement," Trial Lawyers Guide, 24 (Spring 1980), 1-9.

[48] Ibid., note 1.

[49] Ibid., p. 4.

[50] Ibid., p. 7.

[51] R. Begam, "Opening Statement: Some Psychological Considerations," Trial, 16 (July 1980) 33-37.

[52] See text at note 26.

[53] R. Arthur, p. 37.

[54] W. Costopoulos, "Commentaries, Persuasion in the Courtroom," Duquesne Law Review, 10 (1972), 384-409.

[55] R. Lawson, "Experimental Research on the Organization of Persuasive Argument: An Application to Courtroom Communication," Law and Social Order, 1970 (1970) 579-608, also cited as Arizona State Law Journal, 1970, 579.

[56] Costopoulos, p. 387, note 5.

[57] Ibid., p. 390, note 15.

[58] See text supra at note 23, Costopoulos, p. 391.

[59] Ibid., p. 392.

[60] Ibid., p. 393.

[61] Ibid., p. 398.

[62] R. Lawson, supra, note 54.

[63] Ibid., p. 589.

[64] Ibid., p. 598.

[65] Ibid., p. 604.

SELECTED BIBLIOGRAPHY OF "HOW TO" ARTICLES ON OPENING AND CLOSING ARGUMENT

J. Reynolds, "Trial Tactics," *Litigation*, 8 (1982), 14.

W. Lindquist, "Advocacy in Opening Statements," 8 (1982), 23.

R. Crawford, "Opening Statement for the Defense in Criminal Cases," *Litigation*, 8 (1982), 26.

J. Glickman, "Persuasion in Litigation," *Litigation* 8 (1982), 30.

J. Touchy, "Effective Final Argument for the Plaintiff," *Litigation*, 8 (1982), 1941.

F. Cicero, "Nondefensive Final Argument for the Defense," *Litigation*, 8 (1982), 45.

W. Trine, "Motivating Jurors Through Opening Statements," *Trial*, 16 (December 1982), 80.

J. Cleary, "The Final Argument in a Criminal Case," *The Practical Lawyer*, 27 (September 1, 1981), 39.

R. McGuirk, "The Opening Statement in Civil Cases," *New Hampshire Bar Journal*, 22 (October 1980), 2.

H. Head, Jr., "Arguing Damages to the Jury," *Trial*, 16 (February 1980), 28.

R. Marshall, "The Telling Opening Statement," *The Practical Lawyer*, 19 (October 1976), 27.

F. Hare, "The Importance of Argument in Tort Cases--Observations of a Plaintiff's Lawyer," *The Alabama Lawyer*, 33 (April 1972), 187.

H. Rothblatt, "Summation in Criminal Cases," *Tennessee Law Review*, 37 (Summer 1970), 728.

J. Karcher, "The Closing Argument," *The Practical Lawyer*, 15 (March 1969), 49.

G. Martin, "Closing Argument to the Jury for the Defense in Criminal Cases," *Journal of Criminal Law, Criminology and Police Science*, 58 (March 1967), 2.

A. Jennings, "Opening Statements," *Arkansas Law Review*, 19 (Spring 1965), 29.

W. Colson, "Final Argument," *The Mississippi Law Journal*, 36 (1964-65), 500.

J. Miller, "Opening and Closing Statements from the Viewpoint of the Plaintiff's Attorney," The Practical Lawyer, 10 (October 1964), 87.

M. Erdmann, "Some Random Thoughts on Not Opening to the Jury," The Criminal Law Bulletin, 1 (November 1965), 24.

G. Martin, "Closing Argument to the Jury for the Defence in Criminal Cases," The Criminal Law Quarterly, 10 (November 1967), 34.

J. Herron, "The Art of Jury Argument," The Practical Lawyer, 6 (December 1960), 11.

PARTICIPATORY PERSUASION: STRATEGIES AND RESEARCH NEEDS IN OPENING STATEMENTS AND CLOSING ARGUMENTS

Don Peters

A lawyer could begin an opening statement for the plaintiff in a serious personal injury case this way:

> "Good morning, ladies and gentlemen. Thank you for coming to court today. Both the Plaintiff and I surely appreciate your willingness to perform your civic duty and sit on this jury. It is now my opportunity to address you briefly about what our contentions are and what this case is. What I say now is not evidence and it will not be binding on your deliberations. It may, however, definitely help you understand the presentation of my case. We claim that Engulf & Devour's driver, Leon Lush, was negligent and that Mr. Smith has been permanently disabled as a direct and proximate result of that negligence."

Or she could begin like this:

> "At nine on the morning of February 12, 1983, John Smith was a happy and healthy 38 year old man. That morning he had breakfast with Billy and Pamela, his eight year old son and his ten year old daughter. He promised them that he would be home early so that they could ride bikes together before dinner. At 9:15 that morning, John was trapped unconscious in his car with a mangled body and a broken back. He had suffered injuries that would keep him from ever fulfilling his promise to ride bikes with Billy and Pamela. The tragic events of those 15 minutes, and what they mean for John now, and in the future, are our case."

Most jurors, judges, lawyers, and other observers would probably rate the second beginning more effective and persuasive than the first. Few, however, could say specifically why it was more effective and persuasive. Identifying these whys is critically important because they contain theoretical assumptions that point the way to competent lawyering. Articulating and testing these assumptions provide generalizations that have value beyond the specific facts of one case. This process helps lawyers learn from experience rather than simply survive it. It also develops knowledge and approaches that can replace the intuitive, trial and error learning that now occurs.

The emergence of clinical instruction as a robust branch of legal education[1] has generated several efforts to chart paths toward competent lawyering in all areas including opening and closing courtroom communication.[2] Clinical instruction typically uses a performance-based approach that asks students to do opening statements and closing arguments either in role-played contexts or in closely supervised representation of actual clients. The American Bar's recent debate about lawyering competence and how to improve it has also produced an increased interest in improving courtroom communication through continuing legal education.[3] Most of these courses involve some aspect of learning by doing in role-plays and simulations.

The approach to skills instruction used by both clinical and continuing legal educators follows the premise that a person learns to perform a skill by formulating a hypothesis, testing it, and then assessing whether his theory of action and his performance were effective.[4] One major goal of this approach has been to identify generally applicable theories of effective lawyering in each area of trial work to help students formulate accurate performance hypotheses. These theories are typically shared with students before they perform so that they have an opportunity to prepare reflectively.[5] Students test the theory by performing and then they evaluate both the theory and their performance. Clinical and continuing legal educators observe these performances and give specific feedback balanced between positive reinforcement and constructive criticism on both the theoretical and behavioral aspects of them.

Explicit theories of effective lawyering aid this skill learning process in several ways. They allow thoughtful preparation which minimizes the anxiety caused by performing publicly. They also increase the chance that parts of these tasks will be performed successfully. This makes positive evaluation possible and boosts confidence letting later constructive criticism be more easily accepted. These theories build a language for shared dialogue in this learning process and develop necessary self-critiquing skills.

Theories of effective opening statements and closing arguments tackle the mystery of how humans are persuaded. Lawyers have the stage to themselves during opening and closing pursuing one goal: persuasion. They talk directly to the judge or jury. Lawyers open by describing their case before presenting evidence and close by arguing it afterwards. Comparatively few procedural and legal rules constrain these talks. A rule prohibiting argument before presenting evidence, for example, explains the different nomenclature and constitutes the primary constraint on opening statements. Opening and closing share limits on the manner and explicitness of appeals to bias, prejudice, and sympathy.[6] Closing arguments are also constrained by rules prohibiting expressing personal belief in the client's case and misstating evidence.[7]

These opportunities for lawyering solos have generated a large legal literature.[8] Much of it is either anecdotal or a lawyer's attempt to universalize what works best from his method of persuasion. Good advocates have ideas about persuasion and often share written suggestions for opening and closing talks. Occasionally these suggestions collide and one author's do is another's don't. Few of these anecdotes and standard suggestions, however, discuss the persuasive reason for their success. Even fewer link these reasons to theories of persuasion. Virtually none have been tested empirically.

Clinical and continuing legal educators comb the literature and their experience for short, simple statements of theory. Elaborate, abstract paradigms are not the goal. The notion that a brief outline before presentation enhances persuasive argument by organizing, previewing and repeating it is one example of the short, simple concepts that are sought.[9] Applying it here, this paper will present five theoretical concepts that encourage the receiver of persuasion to participate in the process: analogies, factual persuasion, two-sided arguments, themes, and visualizing techniques. These concepts give law students and lawyers tools with which to build persuasive courtroom communications. The clinical learning by doing process will be illustrated by showing how these tools can be used to critique the two excerpts of the opening statement for John Smith.

This paper will honor time and space constraints and avoid vast areas of opening and closing theory. This paper will also, like much legal literature, present theories that have not been empirically tested. All are testable, however, so suggestions for research collaboration between clinical legal educators and communication scientists will be included.

A. LEGAL STRATEGIES FOR PARTICIPATORY PERSUASION

Legal strategy for opening and closing is simply summarized: persuade him or her or them. Getting there is harder. One path, or portion of path, looks at ways to involve the listener. Making him or her participate in the argument is the goal. Communicating in ways that stimulate thought, mental activity, and sensory involvement are the techniques.

This approach, participatory persuasion, follows the theoretical premise that recipients of a meassage hear, understand, and are more susceptible to persuasion by that message if they are active in the receiving process.[10] Involvement boosts attention, facilitates understanding, and enhances persuasion. An idle mind is more than the devil's playground. It is also dangerously susceptible to inattention, confusion, non-persuasion, and sleep.

The participatory persuasion path begins with analogies. Analogies supply an equal sign between something strange and something familiar and are a powerful participatory persuasion tool. They are exceptions to the rule limiting argument to the evidence because they rest on matters of common knowledge and understanding. They do not need to be supported by proof so that trials will not be longer than they already are.

Analogies have been acclaimed as the "greatest weapon" in persuasion's arsenal because nothing moves jurors more convincingly than "an apt comparison to something they know from their own experience is true."[11] Analogies can be used effectively to attack witness credibility, to solve tactical problems, and to explain important factual and legal points.[12] The lawyer for a plaintiff injured in a nuclear power plant accident, for example, might effectively compare the facility to two kettles of boiling water during his opening statement. This helps the jury understand and survive the complicated, technical evidence to come.[13] If John Smith's case depended heavily on circumstantial evidence, his lawyer might use this analogy on closing argument:

> "This reminds me of my father reading Robinson Crusoe to me when I was a little boy. Remember when Robinson was on the island for such a long time all alone? One morning he went down to the beach and there was a footprint in the sand. Knowing that someone else was on the island, he was so overcome with emotion, he fainted.
>
> And why did he faint? Did he see a man? He woke to find Friday standing beside him, who was to be his friend on the island, but he didn't see Friday. Did he see a foot? No. He saw a footprint. That is, he saw marks in the sand, the kind of marks that are made by a human foot. He saw circumstantial evidence. But it was true, it was valid, it was compelling, as it would be to all of you. We live with it all of our lives. So let's look at the facts of this case—for those tracks that prove the truth."[14]

Analogies are persuasive because they first provoke and then reward the listener's intellectual pride. People protect their own ideas.[15] Jurors who reach their own conclusions hold them more firmly than those that they have simply been told to develop. Apt analogies challenge listeners to test their appropriateness to the point made. An analogy skillfully done lets the audience reach the conclusion before the speaker does. Telling them after they have reached the conclusion on their own also works because people like to have their ideas reinforced.[16] The resulting repetition enhances understanding and persuasion. Later counterarguments then often alienate listeners because they hear them as assaults on their own ideas.

Apt analogies also attract attention because they are stories. Everyone loves a good story. Most of us think ahead to anticipate its outcome. Most people will actively listen to a story to learn what happened even if it is not told well. The mundane, technical, and confusing nature of much trial communication heightens the value of any story for the jury. This activity and attention enhances persuasion.[17]

Analogies also promote persuasion by letting the speaker subtly bolster his credibility. Good analogies come from fundamental values that jurors can quickly understand and assimilate. They often involve the lawyer or his family. Combining these elements can create a subtle message about speaker credibility. The Robinson Crusoe approach to circumstantial evidence, for example, tells the listener that the speaker had a father who loved and read to him. It paints a subliminal picture of a boy sitting beside his father listening happily as his father reads Robinson Crusoe. It signals that this speaker loves and reveres his father or his memory. It evokes a basic value that motivates jurors to accept the speaker as a decent, credible person. It also makes them more likely to accept what this speaker says as true. Finally, it works no matter how the listener feels about his actual father because somewhere in the heart of every person is a father reading to him as a child.[18]

Factual persuasion, which involves articulating and strategically sequencing specific facts or reasons before the general points that they support, is another effective way to provoke listener participation. Developing details upon which a conclusion is based before sharing it persuades by coaxing the listener to reach the conclusion first.[19] The specific predicate strengthens the conclusion. Articulating the general point after the predicate reinforces the participants. Strategic sequencing also permits emphasis and thematic development.

The rule prohibiting argument in opening statements makes specifics the key to effective persuasion at the beginning of trial.[20] These specifics must be facts because details about inferences, credibility, law and case theory are not allowed. The general point also cannot be made after the specifics because drawing or asking the jury to draw conclusions constitutes impermissible argument. The claim that Engulf & Devour's driver was negligent in the first example violated that rule. It was also not persuasive because it simply stated a broad conclusion without supporting specifics. This would have been a more effective way to make the point:

> "Leon Lush, the Defendant's driver, was going 50 m.p.h. in a 30 m.p.h. zone. Five minutes after the accident, Officer Krupke arrived and talked to Mr. Lush. Officer Krupke will tell you that he was

> 5 feet away from Mr. Leon during this two minute talk. He smelled alcohol every time Mr. Lush opened his mouth. Mr. Lush's speech was slurred. Officer Krupke also noticed that Mr. Lush's eyes were very red and his face was flushed."

Conclusions may be drawn on closing so that this example could be followed by an argument that Lush was drunk at the time of the tragedy. It could also be followed by a request that the audience draw its own conclusion. Arguing specifics on closing should go beyond the facts and include details about how the listener should interpret the evidence. Specific suggestions regarding witness credibility, inferences, reasoning options, counsel's theory of the case, and the applicable law should be included. They should add up to a way of thinking about the case that wins it.

Arguing specifics counteracts a common mistake of making argument non-persuasively vague.[21] It also subtly strengthens speaker credibility because it forces precise preparation. Linking points to their supporting specifics encourages pre-delivery analysis of precisely why a contention is cogent.[22] It also generates conviction in those that pass this test. Projecting that conviction enhances the speaker's and the message's credibility.[23]

The next set of participatory devices do not induce simultaneous thinking and reasoning by the listener. Instead they involve telling in ways that create tools for the factfinder's use in accepting argument or resisting counterpersuasion. Although all argument can have this result, some approaches enhance later participation by the listener.

Two-sided arguments dramatically demonstrate the potential that these forms of persuasion carry to induce later participation. A two-sided approach presents and then refutes a strong counterargument. It provokes critical perspectives and resistance rationales that listeners can use against counterpersuasion. If it also induces commitment moving participation from listening critically to defending established belief, the biological analogy to innoculation and immunization is complete. The listener has been made resistant to the counterargument by exposure to a weakened dose which will stimulate its defenses to later attack.[24]

Anticipating and annihilating a strong counterargument also enhances the force of the message. Primacy bolsters the refutation. The juxtaposition of contention and rebuttal highlights the latter. It also weakens the counterargument and stimulates recollection of the rebuttal.[25]

Two-sided arguments also build speaker credibility. Anticipating unfavorable facts and arguments communicates candor and fairness.[26] The contrast between this and the factfinder's expectation augments their persuasive value. Two-sided arguments also build credibility by communicating the speaker's intelligience and ability to recognize and argue both sides.[27]

Anticipation alone is often appropriate because of its credibility value. It can turn terrible weakness into substantial strength.[28] Factfinders forgive much if it is acknowledged initially.[29] Forthright admissions build credibility and create aversion to repeated attempts to stress the point later.[30]

The rule prohibiting argument on opening statement limits the two-sided argument to specific fact persuasion. Phrased positively it can be very effective. If John Smith had a pre-existing back injury at the time of this tragedy, for example, an effective, positively phrased opening would be:

> "John was just beginning to recover from a painful back injury when the defendant's young driver smashed the truck into the back of John's car. John's head snapped back violently. Then he was thrown forward and twisted as metal bent and broke. This wreck renewed that long cycle of pain and treatment that John and Dr. Bigbucks will tell you about."

Closing allows full freedom to anticipate and annihilate. Although the factfinder may be familiar with counterarguments by then, anticipating and annihilating them can still be effective. It gives friends on the jury ammunition to use against the point during deliberation. Factfinders who have been wondering about the point will also appreciate reinforcement of their foresight. This reinforcement may sway them to accept the refutation. A two-sided closing argument using an analogy scores triple bonus points. Consider this approach to John's pre-existing back injury:

> "We come to damages and a difficult decision. I wish it could be a simpler case, like a farmer driving his pickup truck along the highway, when someone crashes through a stop sign and hits him and turns him over. He is not injured, just the truck is. Windshield out, dented fenders. And if you, as a jury, were asked what's fair compensation, I do not think you would have much problem. You would give him the kind of truck that he had. He is not entitled to a new truck, because he did not have one. But he should not have to drive a wrecked truck with mashed fenders and no windshield, because he did not have that either. So a fair result, a fair compensation, would be the costs of putting the fender back in the condition that it was in and

> replacing the windshield. You would have no problem with it, and I am sure my learned brother on the defense would accept that.
>
> Well, suppose the farmer was a poultry farmer, and he was taking eggs to market. And he had a hundred dozen grade A eggs in the back of his pickup truck. After it is turned over, there are a hundred dozen grade A fresh eggs all over the highway, with broken yolks and whites running over the pavement. What is fair compensation? Those were his eggs. They were marketable. His property has been taken away. His income has been taken away. What is fair compensation? Ninety cents a dozen retail? No. He was not going to sell them retail. He was going to sell them wholesale, and the wholesale market prices reported in the newspaper were forty-six cents a dozen. Forty-six dollars. Now in that situation, wouldn't you think a defense lawyer was completely out of his mind, if he said 'Don't give him forty-six dollars for those eggs. Why, if they had been golf balls, not a one would have been broken.'
>
> I don't mean my client was an egg, but he was like an egg. He was fragile. But he was still useful and marketable. He could sell what strength he had in the marketplace of labor. He was certainly not a golf ball and he didn't bounce. But fair compensation is to restore the loss that has actually been inflicted on the actual man. And when you break and actual egg, fair compensation is paying the value."[31]

Themes are the next stop on the participatory persuasion path. A theme, like a two-sided argument, creates a continuing communication. It broadens the participatory potential, however, by injecting a simple rationale that explains why you win and your opponent loses. An effective theme provides a comfortable viewpoint from which the jury can assess all the evidence. It stays with them throughout the trial to enhance their understanding and to stimulate their resistance to counterpersuasion.[32] It should pervade the trial like the emphasis on participation pervades this paper.

An effective theme wraps legal theory and as much of the evidence as possible into a coherent whole. It must be plausible and aligned with the way the world works.[33] It must be simple. It should also be congruent with the listener's values. Most jurors, for example, probably assign more importance to the value of paying a debt than to the value of charity.[34] Accordingly, a simple, plausible, and value-congruent theme for John Smith's case would be:

> "John Smith has suffered a serious wrong for which Engulf & Devour owes a debt. That debt should be paid."

This theme should be sounded in opening statement. Beginning the opening statement with it is very effective because it meets maximum attention, receptivity, and eagerness to learn.[35] Specific present or past tense recitation of the facts leading to the lawsuit is a good way to develop a theme. The second alternative opening for John Smith demonstrates this. It describes the seriousness of the wrong done John in a specific, compelling manner. Including the personal facts that John ate breakfast with Billy and Pamela and promised to ride bikes with them effectively sketches the seriousness of his injuries and invokes empathy.[36] The first excerpt, on the other hand, wasted this initial opportunity by saying traditional things that neither captured attention nor provoked participation.[37]

Closing argument permits explicit explanation of this debt-paying theme. Weaving it throughout the argument will remind and reinforce participating jurors who had guessed it. It will also capsulize this contention and promote its use during deliberation.[38]

This weaving can be done effectively by using the theme as the centerpiece of the closing. Effective closing argument does not simply summarize which witness said what. Instead it persuasively marshalls facts and other evidence to support thoughtfully organized persuasive points.[39] The simplest, most effective organizing tool is the theme. Closing explains why John Smith wins. An effective closing for John Smith here will persuade why he was seriously wronged; why Engulf & Devour is indebted to him as a result; the extent of that debt; and why it must be paid.

This brief look at participatory persuasion ends with techniques for involving more than the listener's ears. Although humans make decisions by processing data through all five senses,[40] most trial argument is aimed only at the ears. It is hard to involve touch, taste and smell during opening and closing. It is not hard to involve eyes since listeners are already visually involved watching nonverbal cues.[41] These techniques suggest involving them visually beyond the nonverbal aspects of trial argument. They demonstrate that taking advantage of the fact that most people learn more and faster through their eyes than through their ears pays persuasive dividends.[42]

Tangible, visual evidence involves the eyes and is powerfully persuasive. Documents, the things involved in the case, and demonstrative aids like diagrams, charts and photographs comprise a comparatively small part of trial evidence and consequently carry great persuasive weight.[43]

Writing key words on a blackboard or a large flip pad adds visual emphasis and aids persuasion.[44] Television has inflated a picture's worth from a thousand to at least a half a million words. Showing these visual symbols during opening and closing takes advantage of their tremendous teaching potential. It stimulates visual participation then and later because most of this evidence can be consulted during deliberation.[45] It also permits speaking pauses which let important points sink in.[46]

Demonstrations and role plays during closing arguments can be very persuasive because they visually involve the factfinder. Briefly role-playing important testimony by paraphrasing it in question and answer dialogue gives it a visual edge and avoids what otherwise might be a tedious summary. Demonstrations can also be very effective ways to argue witness credibility. A simple shrug of the face and shoulders, for example, is a tactful but persuasive way to make the point that the defendant's alibi witness should not be believed because she is his mother.[47] Less than credible claims also can be undercut by demonstrating their incongruence with the way the world works. In the now celebrated case of an insurance claim filed by Peck's estate alleging that Peck fell overboard and was swept away by the tide, the claim hinged on the testimony of another seaman who was peeling potatoes when he saw the body of his friend float by his porthole. He neglected to tell his Captain about it, however, until the next morning. The defendant's lawyer during closing put his foot on a chair, took a potato and a knife from his pocket, and began to peel that potato, making this argument very effectively:

> "Why what is that I see floating by my porthole! It is a body. Why it is the body of my dear friend Peck! The tide is carrying Peck away. I should tell the Captain to sound the alarm. I will tell the Captain. Tomorrow morning. For now I must stay here. And peel my potato."[48]

Wise word choice also stimulates visually by creating images that help listeners see points in their minds. Concepts delivered with language that creates visual mental images are more easily understood and remembered.[49] Vivid words are dramatic and persuasive. Short adjectives, nouns and verbs with punch best provoke visual participation.[50]

The second opening for John Smith demonstrates vivid adjective choice. Her use of "happy and healthy, mangled body", and "broken back" was effective. The first excerpt, however, sounds too much like a lawyer to be persuasive. She avoids activating adjectives and presents abstract legal concepts like "negligent" and "direct and proximate result" that predictably will provoke yawning rather than visualization. Her phrase "permanently disabled" also is much less visual than the second excerpt's image of never riding bikes with Billy and Pamela again. Finally, the intensifying adjectives used, "surely appreciate" and "definitely help," are not effective because they lengthen the communication but provide no persuasive punch. Research has shown that such intensifiers achieve the opposite of their intended effect and are not convincing.[51]

Nouns and verbs also help shape how factfinder's think and react to trial evidence and argument. John Smith's lawyers will talk about the "crash, collision," and "smash-up." The truck will "careen, speed," and "collide." Lawyers representing Engulf & Devour will refer to the "accident, incident," and "unfortunate occurrence." The truck will "proceed, progress," and "come into contact with." This linguistic struggle is designed to enlist and influence listener participation. The right words make a difference. As Mark Twain noted:

> "The difference between the right word and the almost right word is the difference between lightening and the lightening bug."[52]

Participating in persuasion is tiring. Listening actively and attentively is difficult, so opening statements and closing arguments should be brief. Talking too long is ineffective. Few souls are saved, in church or in court, after thirty minutes.[53] Heeding that admonition, this paper turns to research needs in participatory persuasion.

B. RESEARCH NEEDS FOR PARTICIPATORY PERSUASION

Lawyering and how it can be done effectively is fertile ground for social science research. It has only recently surfaced as a major academic interest in the legal profession. Clinical and continuing legal educators have pursued that interest and generated specific ideas about competent lawyering. These ideas are not conclusions supported by evidence. They are more accurately hypotheses about what works.

Virtually none of the hypotheses that underlie the preceding description of five participatory persuasion devices have been tested. All of them should be tested to insure that they are effective.[54] Clinical and continuing legal educators often are too busy practicing and teaching to design and conduct these tests. Many also lack training in empirical methodology. Most, however, are willing to participate in transdisciplinary research. Most also work in contexts that lend themselves to research collaborations.

Trial advocacy courses are an untapped resource for research collaboration. The performances and critiques in these courses generate intense discussion and refinement of advocacy theory. Some of that energy could easily be channeled into empirical research.

The legal profession has recommended that all interested law students should be exposed to trial advocacy training while they are in law school.[55] Most law schools offer at least one course in these skills and many provide more than one.[56] Clinical teachers usually direct these courses. Most of them give students opportunities to make opening and closing arguments in simulated trials. Videotaping is also used extensively.

Experiments could be designed for these courses using simulated lawyering events to test small parts of participatory persuasion theory. Rigid design controls to make the experiments viable are possible. Videotaped openings and closings that are identical except for the participatory persuasion devices under investigation, for example, could be shown to juries. The juries are usually first year law students who are not yet totally biased by their legal training. Volunteers from other parts of the university or community could also be used as sources for juries.

Trial advocacy courses taught to lawyers enrolled in continuing legal education programs also offer chances for research collaboration. These approaches use the same learning by doing approaches that are followed in law school classes. Videotaping is also used extensively. Occasionally volunteer juries are enlisted from the community. Research could be based on performances by either students or teachers or both.

Professor McElhaney, teaching a trial advocacy course a few years ago, had each of his students develop and use an analogy during their closing argument in a simulated trial.[57] Although this was an effective teaching approach, it could be broadened to include a comparison of similar closings used on the same case. Comparing closings with analogies to those without them might disclose whether they are the greatest weapon in persuasion's arsenal.

Are analogies so effective that they should be used on relatively minor points? Do their credibility and participation benefits offset the additional time that they take when the point that they make is not crucial? How many analogies should be used for maximum effectiveness?[58] How can demographic research and observation of nonverbal behavior during voir dire and trial be linked to development and delivery of effective analogies? All of these questions could be approached in clinical and continuing legal education simulations. They are also sufficiently important to warrant investigation using other experimental approaches and designs.

Although two-sided arguments have been researched much more than the other devices discussed in this paper, many questions remain about them that could be answered by short, creative experiments using simulated trials. Most commentators, for example, caution against excessive anticipation to avoid turning what should be a positive message into an apology.[59] The theory underlying two-sided arguments, however, suggests maximizing them as a credibility builder. Is credibility sufficiently maximized by anticipating just the strongest counterargument? How many strong counterarguments should be anticipated? In situations where there is no strong counterargument should one nevertheless be anticipated and annihilated for credibility purposes? Answers to these questions could also be pursued profitably through other experimental designs.

Virtually all of the literature and much of the limited research on opening and closing has involved jury trials. A substantial amount of lawyering, however, requires persuading judges.[60] How much of this literature and research is valid in judicial persuasion?

Do analogies persuade judges? Analogies are often an important component of arguing authority but do they have any other values in judicial persuasion? Although their credibility value would seem to be diminished because judges bring notions of credibility stemming from previous interactions, what about their participatory value? Are analogies too time consuming and incongruent with the desire to get on with things predictably present in most trial judges? Are they too corny? Do judges resent receiving "jury style" arguments?

Do two-sided arguments persuade judges? Although their credibility value seems similarly diminished, their participatory value needs investigation. Do two-sided arguments effectively appeal to the judicial temperment which realizes that decision-making always involves choosing between alternatives? Or are judges, by virtue of their training, immune from innoculation? Does the judicial mind participate too actively in two-sided arguments? Research on all of these questions would be beneficial.

Is factual persuasion a good idea when making an opening statement in a bench trial? Do judges like or want opening statements? What changes, if any, should be made in thematic development and visualizing approaches when arguing to a judge instead of to a jury? Do these techniques have the same effect on judges?

Testing these questions cannot be done easily in simulated clinical and continuing legal education courtrooms. It could be done, however, in conjunction with continuing judicial education. These programs are increasing in frequency and complexity at both state and federal levels. They often involve training in communication and decision-making skills so experiments designed to answer some of these questions would not be totally foreign. Questionnaire research surveying how judges say they react to these aspects of courtroom persuasion is also possible, necessary, and overdue.

Theories of effective opening statement and closing argument have been articulated. The five participatory persuasion devices discussed here are one small example. These ideas now need to be tested. Clinical and continuing legal educators and social scientists can and should participate collaboratively in this testing. Some has been done. Much more is needed.

Professor of Law and Director, Civil Clinic, University of Florida College of Law.

[1] Clinical education is the term used to describe law school programs that provide instruction in practical aspects of practicing law. *Report of the Association of American Law Schools—American Bar Association Committee on Guidelines for Clinical Legal Education* 12 (1980) [hereinafter cited as *Report*]. Approximately 90% of the American Bar Association approved law schools offer at least one form of clinical legal education. Gordon Gee, "Survey of Clinical Legal Education," in *Survey and Directory of Clinical Legal Education*, 1978-79, xxi (CLEPR 1979). Clinical programs started in the 1960s with a focus on poverty law and have increased 320 percent since 1970 and now cover 59 legal areas. *Id*.

[2] The following books by clinical legal educators discuss opening statements and closing arguments: Gary Bellow and Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction Advocacy* (Mineola, N.Y.: The Foundation Press, Inc., 1978), pp. 826-956 [hereinafter cited as Bellow & Moulton]; Paul Bergman, *Trial Advocacy* (St. Paul: West Publishing Co., 1979), pp. 248-332 [hereinafter cited as Bergman]; Steven H. Goldberg, *The First Trial: Where Do I Sit? What Do I Say?* (St. Paul: West Publishing Co., 1982), pp. 191-209, 390-396 [hereinafter cited as Goldberg]; Kenney F. Hegland, *Trial and Practice Skills* (St. Paul: West Publishing Co., 1978), pp. 37-49, 101-113 [hereinafter cited as Hegland]; James W. Jeans, *Trial Advocacy* (St. Paul: West Publishing Co., 1975, Student Ed.), pp. 197-210, 367-394 [hereinafter cited as Jeans]; Thomas A. Mauet, *Fundamentals of Trial Techniques* (Boston: Little, Brown & Co., 1980), pp. 49-83, 295-360 [hereinafter cited as Mauet]; and James W. McElhaney, *Trial Notebook* (Chicago: American Bar Association, 1981), pp. 37-41, 201-214 [hereinafter cited as McElhaney].

[3] Kenneth S. Broun, "Teaching Persuasion to Lawyers," *Litigation*, 3 (Summer 1977), 34; Kenneth S. Broun, "Teaching Advocacy the N.I.T.A. Way," *American Bar Association Journal*, 63 (September, 1977), 1220; Paul deVendel Davis, "The Trial Advocacy Institutes," *Litigation*, 5 (Summer 1979) 11; John R. DeBarr, "When Student Turns Lawyer," *Docket Call*, 7 (Winter 1983), 9; John Jay Douglass, "Lawyers Competence and CLE," *Trial*, 15 (February 1979) 27; Dorothy Linder Maddi, "Improving Trial Advocacy: The Views of Trial Attorneys," *American Bar Foundation Research Journal*, 1981 (1981) 1049; and Howard A. Specter, "ATLA's National College of Advocacy: An Educational Innovation," *Trial*, 15 (February 1979) 32.

[4] Ernest R. Hilgard, and Gordon H. Bower, *Theories of Learning*, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975, 4th Ed.), pp. 608-609; Joseph D. Harbaugh, "Simulation and Gaming: A Teaching/Learning Strategy for Clinical

Legal Education," in *Report*, *supra* note 1, at 191 and 209.

[5] These theories serve as a preview of the experience to come in the simulated exercises in the field work. David Ausubel, "Cognitive Structure and the Facilitation of Meaningful Verbal Learning in Contemporary Issues and Educational Psychology," cited in David R. Barnhizer, "The Clinical Method of Legal Instruction: Its Theory and Implementation," *Journal of Legal Education* 30 (1979), 67.

[6] William A. Trine, "Motivating Jurors Through Opening Statements," *Trial*, 18 (December 1982) 80.

[7] Jeans, *supra* note 2 at 206-208, 380-83; Guy O. Kornblum, "The Voir Dire, Opening Statement, and Closing Argument," *The Practical Lawyer*, 23 (October 1977) 11, 24-25; and William A. Trine, *supra* note 6 at 84-85.

[8] The literature includes many books and articles in addition to the recent works produced by clinical legal educators listed in note 2 *supra*. Books include: David Cohen, *The Crucial Ten Percent That Really Counts for Trial Victory* (Englewood Cliffs, N.J.: Executive Reports Corp., 1973); Leonard Decof, *Opening Statement* (New York: Matthew Bender & Co., Inc., 1982); Irving Goldstein and Fred Lane, *Trial Technique* (Wilmette, IL: Callaghan & Co., 1969, 2d Ed.); Robert E. Keeton, *Trial Tactics and Methods* (Boston: Little Brown & Co., 1973, 2d Ed.); Joseph Kelner and Francis E. McGovern, *Successful Litigation Techniques* (New York: Matthew Bender & Co., Inc., 1981, Student Ed.); Alan E. Morrill, *Trial Diplomacy* (Chicago: Court Practice Institute, Inc., 1972, 2d Ed.); Lawrence J. Smith, *Art of Advocacy: Summation* (New York: Matthew Bender & Co., 1978); J. A. Stein, *Closing Argument, the Art and the Law* (Wilmette: Callaghan & Co., 1969); and Lloyd Paul Stryker, *The Art of Advocacy* (New York: Simon & Schuster, 1954). The following illustrate articles on the topic published in the last ten years. William A. Trine, *supra* note 6; Rodney M. Arthur, "How To Use Speech Principles To Persuade on Opening Statement," *Trial Lawyer's Guide*, 24 (1980) 1; Robert G. Began, "Opening Statement: Some Psychological Considerations," *Trial*, 16 (July 1980), 33; James J. Brosnahan, "Basic Principles of Advocacy: One Trial Lawyer's View," *American Journal of Trial Advocacy*, 3 (1979), 249; Michael F. Colley, "The Opening Statement: Structure, Issues, and Techniques," *Trial*, 18, (November 1982) 53; George A. LaMarca, "Opening Statements—Effective Techniques," *Trial Lawyer's Guide*, 1978, 21, 446; Fredric G. Levin, "Strategy for Opening Statement: A Case Study," *Trial Diplomacy Journal*, 4 (Fall 1981) 13; Weyman I. Lundquist, "Advocacy in Opening Statements," *Litigation*, 8 (Spring 1982) 23; Russell H. McGuirk, "Opening Statements in Civil Cases," *Trial Diplomacy Journal*, 5 (Fall 1982) 34; Tom Riley, "The Opening Statement: Winning at the Outset," *American Journal of Trial Advocacy*, 3 (1979) 225; Sumpter, J. L., "A Trial Lawyer's Greatest Tool: The Opening Statement," *Trial Lawyer's Quarterly*, 1978, 12, 34.

[9] This approach is also participatory because it encourages listeners to see progress as the argument proceeds from one point to the next. Bergman, supra note 2, at 268-69; Hegland, supra note 2, at 42-43.

[10] Carl I. Hovland, Irving L. Janis and Harold H. Kelley, Communication and Persuasion, (New Haven: Yale University Press 1953) 215-240; Thomas Sannito, "Psychological Courtroom Strategies," Trial Diplomacy Journal, 4 (Summer 1981) 30.

[11] Craig Spangenberg, "Basic Values and the Techniques of Persuasion," Litigation, 3 (Summer 1977), 13, 16.

[12] Bergman, supra note 2, at 302-311; McElhaney, supra note 2, at 208-214.

[13] This suggestion was effectively demonstrated by James MacNamera, one of the teaching lawyers at the Advanced Trial Lawyer's Institutes sponsored by the National Institute for Trial Advocacy, held in Gainesville, Florida, in March, 1980.

[14] Craig Spangenberg, supra note 11, at 16.

[15] McElhaney, supra note 2, at 201; Lloyd Paul Stryker, supra note 8, at 125.

[16] McElhaney, supra note 2, at 202.

[17] Richard J. Crawford, "Closing Argument: High Noon at the Penthouse Corral," Trial Diplomacy Journal, 5 (Winter 1982-83), 12.

[18] McElhaney, supra note 2, at 203.

[19] Goldberg, supra note 2, at 196; Weyman I. Lundquist, supra note 8, at 23.

[20] Goldberg, supra note 2, at 191-192, 196; Weyman I. Lundquist, supra note 8, at 23; Mauet, supra note 2, at 51-52.

[21] Bergman, supra note 2, at 311-312; Hegland, supra note 2, at 38. The desire to avoid stating the obvious and excessive familiarity with the case gained during preparation cause much of this tendency to be non-persuasively implicit and vague. Id.

[22] Hegland, supra note 2, at 4.

[23] Hegland, supra note 2, at 84-85. Aristotle thought that credibility or ethos, was the most potent means of persuasion. Aristotle, The Rhetoric of Aristotle, trans. Lane Cooper (New York: Appleton-Century-Crofts, Inc., 1962), p. 9. Ralph Waldo Emerson said that what one is speaks so loudly others can't hear what is said. Ralph Waldo Emerson, Letters and Social Aims (Boston: J. R. Osgood, 1976), p. 86. Professor McElhaney asserts that the

following simple progression underlies every trial: "I am honest. You should believe me. I believe in the justice of my client's cause. Therefore, you should decide for my client." McElhaney, supra note 2, at 15. Most lawyers who write about courtroom persuasion join these opinions and conclude that the credibility of the speaker is a critically important component of persuasiveness. Michal F. Colley, "First Impressions," Litigation, 3 (Summer 1977), 8; Julius Glickman, "Persuasion in Litigation," Litigation, 8 (Spring 1982), 30.

[24] W. J. McGuire, "Inducing Resistance to Persuasion, Some Contemporary Approaches," Advances in Experimental Social Psychology, (New York: Academic Press, 1964, L. Berkowitz, ed.) 1, 200.

[25] Robert G. Lawson, "Experimental Research on the Organization of Persuasive Arguments: An Application to Courtroom Communications," Law and Social Order, 1970 (1970), 579.

[26] Goldberg, supra note 2, at 204-205.

[27] Bergman, supra note 2, at 321.

[28] McElhaney, supra note 2, at 5. An example is demonstrated by the case where a lawyer's client lost his leg when it was run over by the defendant's streetcar. Unfortunately, the plaintiff was a derelict who spent most of his time begging money on the street for cheap wine. Anticipation produced this classic final argument:

> "Clean sheets he never knew, but did they have to take his leg? A warm meal he seldom had, but did they have to take his leg? An education, a good job, fine clothes—all were strangers to him—but did they have to take his leg?"

This example was told by Judge Gerald T. Wetherington of Dade County, Florida, to a group of students at the 1978 National Institute for Trial Advocacy Conference in Boulder, Colorado, and is cited in McElhaney, supra note 2, at 5.

[29] James J. Brosnahan, supra note 8, at 255.

[30] Bergman, supra note 2, at 321.

[31] Craig Spangenberg, supra note 11, at 18. Mr. Spangenberg indicates that this analogy can go on:

> "Suppose it wasn't an egg. It was a horse. What is the value of the horse? What kind of horse? An old plow horse worth $50.00? Or was it Nashua, the day after he was sold to the syndicate for one million, two hundred thousand dollars as the first million-dollar horse? There have been many since.

> Well, if it was Nashua, Nashua was worth one million, two hundred thousand dollars. No man that I know of is worth as much as a horse, but that's not so surprising. Men are not as productive, generally, as horses. A horse races for hundred thousand dollar purses. Men don't even though they race the same mile and a quarter. Then a horse, a great sire, gets about ten thousand dollars for each service at stud, and I don't know any man who was ever worth that either. So you say the horse was more productive than the man and that's why you pay a high price for the horse.
>
> But what about, a painting? Rembrandt's Aristotle Contemplating the Bust of Homer was sold at auction for two million, three hundred thousand dollars. A copy of it might be worth $50. What did you destroy? The copy or the original? And why should the original be worth so much? It isn't productive of anything. Well, its valuable because Rembrandt is dead, and was unique and talented, and no man will ever lay pigment on a canvas with a brush again the way he did. So no one will ever again paint light coming out of the background like he did.
>
> So his painting is unique. And you members of the jury know that God will never make another human arm quite like the arm that Joe Wilson had. It was unique to him. It had value, great value. I'm going to ask for one hundred and twenty-five thousand dollars for that arm. I know that kind of money doesn't grow on raspberry bushes, but a good right arm doesn't grow on a raspberry bush either." Id.

[32] Richard J. Crawford, "Opening Statement for the Defense in Criminal Cases," Litigation, 8 (Spring 1982) 26; Goldberg, supra note 2, at 196-197; Jeans, supra note 2, at 200-201; Weyman I. Lundquist, supra note 8, at 24; George Vetter, Successful Civil Litigation: How to Win Your Case Before You Enter the Courtroom, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1977), 21-24.

[33] James J. Brosnahan, supra note 8, at 250-252; McElhaney, supra note 2, at 3-7.

[34] Craig Spangenberg, supra note 11, at 14; McElhaney, supra note 2, at 6.

[35] Robert G. Began, supra note 8, at 36-37; Richard J. Crawford, supra note 32, at 27; Goldberg, supra note 2, at 202. Research strongly suggest that most jurors tentatively decide the case after the opening statement so the psychological principle of primacy is of paramount

important then. Goldberg, *supra* note 2, at 193; Jeans, *supra* note 2, at 199.

[36] Everyone is involved in small, daily personal events that exemplify something of greater significance. Weaving them into courtroom communication creates juror empathy. Goldberg, *supra* note 2, at 201; Jacob A. Stein, "The Rhetorical Question and Other Forensic Speculations," *Litigation*, 3 (Summer 1977), 22.

[37] Beginning by reminding members of the jury that they are involuntarily present that morning is not often persuasive. Moving next to a disclaimer of credibility is similarly nonpersuasive. If such a reminder must be made, it will come from the judge in the form of an instruction. It should not come from an advocate seeking to get listeners participating in persuasion. Patrick E. Higginbotham, "How to Try a Jury Case: A Judge's View," *Litigation*, 7 (Fall 1980), 8; Jeans, *supra* note 2, at 205; Goldberg, *supra* note 2, at 206; James W. McElhaney, "The Stock Phrases," *Litigation*, 8 (Summer 1982), 49.

[38] Goldberg, *supra* note 2, at 393-394.

[39] Frank Cicero, "Nondefensive Final Argument for the Defense," *Litigation*, 8 (Spring 1982) 45; Goldberg, *supra* note 2, at 393-394; Hegland, *supra* note 2, at 41-42; Bergman, *supra* note 2, at 270-74.

[40] John L. Barkai, "New Model for Legal Communication: Sensory Experience and Representational Systems," *Cleveland State Law Review*, 29 (1980), 575, 580. Professor Barkai contends that most people prefer to communicate in either a visual, auditory, or kinesthetic modality. He suggests that persuasion can be enhanced by determining the representational system used by the factfinder. This can be deduced by observing the language employed and the eye movements of the factfinder during voir dire. Once the representational system is determined, appropriate matching language can be used in the communication to enhance its persuasiveness. John L. Barkai, "Sensory Based Language in Legal Communication," *The Practical Lawyer*, 27 (1981), 41-55; Stephanie L. Swanson and David Wenner, "Sensory Language in the Courtroom," *Trial Diplomacy Journal*, 4 (Winter 1981), 13.

[41] Lawyers writing on opening and closing generally accept the contention that 55% of the total message is non-verbal and non-vocal, including posture, body movements, facial expressions, and factors such as clothing. Michael F. Colley, *supra* note 8, at 53; John Stefano, "Body Language and Persuasion," *Litigation*, 3 (Summer 1977), 31.

[42] Thomas Sannito, *supra* note 10, at 31; David U. Strawn & G. Thomas Munsterman, "Helping Juries Handle Complex Cases," *Judicature*, 65 (1982), 444.

[43] Goldberg, *supra* note 2, at 146-47; Russell H. McGuirk, *supra* note 8, at 36; Weyman I. Lundquist, *supra* note 8, at 25; Tom Riley, *supra* note 8, at 235; J. Erick Smithburn and James H. Seckinger, "Visual Evidence," *Litigation*, 9 (Winter 1983), 33.

[44] Jonathan R. Crane, "Graphic Testimony and Presentations," *Trial Diplomacy Journal*, 5 (Winter 1982-83) 18; Hugh G. Head, Jr., "Arguing Damages to the Jury," *Trial*, 16, (February 1980), 28, 29; Thomas H. Singer, "Testimony as Demonstrative Evidence," *Litigation*, 3 (Summer 1977), 19.

[45] Melvin Belli, "Demonstrative Evidence: Seeing is Believing," *Trial*, 16 (July 1980), 71.

[46] Hugh G. Head, Jr., *supra* note 44, at 28.

[47] This example is from Irving Younger's classic videotape lecture, "The Ten Commandments of Cross Examination."

[48] This example was shared by Irving Younger in a lecture entitled "Virtuoso Cross-Examination," given at the Advanced Trial Lawyer's Conference of the National Institute of Trial Advocacy held in Gainesville, Florida, in March, 1979. It also appears, phrased differently, in Lloyd Paul Stryker, *supra* note 8.

[49] Goldberg, *supra* note 2, at 199-200; Theodore I. Koskoff, *supra* note 32, at 24-26.

[50] James Dempsey, "The Power of Understatement," *Trial Diplomacy Journal*, 2 (1979), 30; Julius Glickman, *supra* note 23, at 32; Goldberg, *supra* note 2, at 200; Hegland, *supra* note 2, at 106.

[51] John M. Conley, William M. O'Barr and E. Allan Lind, "The Power of Language: Presentational Style in the Courtroom," *Duke Law Journal*, 1978, (1978), 1375; Marilyn R. Abbey and William M. O'Barr, "Law and Language: The Duke University Studies," *Trial Diplomacy Journal*, 4 (Winter 1981) 26; John M. Conley, "Language in the Courtroom," *Trial*, 15 (September 1979), 32.

[52] Cited in McElhaney, *supra* note 2, at 186.

[53] Patrick E. Higginbotham, *supra* note 37, at 11; Hugh G. Head, Jr., *supra* note 44, at 30. Mark Twain again makes the point by telling about the preacher who was so spellbinding that he resolved to contribute all his money to the cause. The minister kept on and Mark decided he

would give him all of his folding money. A few minutes later, Mark was down to all the loose change. The good pastor ultimately kept on so long that finally Mark vowed that he stole a quarter from the plate when it was finally passed around. Hugh G. Head, *supra* note 44, at 30.

[54] The need for more articulate theories of lawyering operations has often been discussed. Robert J. Condlin, "Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction," *Maryland Law Review*, 40 (1981), 223; Thomas A. DeCotiis and Walter W. Steele, Jr., "Lawyering Skills: A Critique," *Trial*, 13 (August 1977), 29; Steven H. Leleiko, "Clinical Education, Empirical Study, and Legal Scholarship," *Journal of Legal Education*, 30 (1979), 149; Charles B. Kelso, "In Quest of a Theory for Lawyering: Some Hypotheses and a Tribute to Dean Soia Mentschikoff," *Miami Law Review*, 29 (1975), 159. Some tentative work has been done in this area. Walter Probert and Louis M. Brown, "Theories and Practices in Legal Profession," *Florida Law Review*, 19 (1966), 447; H. Russell Courts and Jack L. Sammons, "The Search for 'Good Lawyering': A Concept and Model of Lawyering Competencies," *Cleveland State Law Review*, 29 (1980) 397; Carrie Menkel-Meadow, "The Legacy of Clinical Education: Theories About Lawyering," *Cleveland State Law Review*, 29 (1980), 555.

[55] *Report and Recommendations of the Task Force on Lawyer Competency: The Role of Law Schools, of the American Bar Association Section on Legal Education and Admissions to the Bar* (known as the Crampton Report), Recommendation I(B)(4), (1979), 4.

[56] The University of Florida College of Law, for example, offers Trial Advocacy, taught by a member of the law faculty and rotating teaching teams composed of practicing lawyers and judges from around the state of Florida, and Practice Court, taught by adjunct faculty.

[57] McElhaney, *supra* note 2, at 212.

[58] Professor Bergman cautions against too many analogies to prevent the argument from turning into a nightclub monologue. Bergman, *supra* note 2, at 308. On the other hand, Professor Crawford describes the four analogies used by Gerry Spence in one morning at the Penthouse libel case as "bright lights which shown through the legalistic jargon and illuminated the faces and minds of the jurors and the observers." Richard J. Crawford, *supra* note 17, at 14.

[59] Bergman, *supra* note 2, at 319-320; Goldberg, *supra* note 2, at 204.

[60] Very little recent legal literature has discussed the topic of persuading judges. Bellow & Moulton, *supra* note 2, at 650-652, 869-870; John P. Corderman, "Psychological Persuasion of the Court," *Litigation*, 7 (Fall, 1980), 5; Jeans, *supra* note 2, at 145-148; Prentice H. Marshall, "Persuading Judges in Bench Trials," *Litigation*, 3 (Summer 1977), 11; Symposium, "What Turns Judges On (and Off) About Trial Lawyers," *Trial Diplomacy Journal*, 4 (Summer 1981, Part 1; Fall 1981; Part 2), 22, 6.

FROM THE COMMUNICATION PROFESSION: COMMUNICATION STRATEGIES AND RESEARCH NEEDS ON OPENING STATEMENTS AND CLOSING ARGUMENTS

V. HALE STARR

During the last several decades, behavioral scientists have shown ever increasing interest in the scientific study of legal institutions and the relationship between law and social science, psychology and communication theory. Certainly, this is exemplified by the number of classes at both the undergraduate and graduate level with titles such as "Forensic Psychology," "Applied Psychology in the Courtroom," "Psychology and the Law," or "Social Psychology for the Lawyer."

Research has focused primarily upon aspects of the trial that have particular interest in both the legal and behavioral areas: the behavior of the judge or jury in decision making, the techniques of jury selection, the importance or meaningfulness of legal instructions, effects of defendant or victim characteristics on jury verdicts, witness credibility, the value and reliability of various types of evidence and the effect of the order of the presentation of evidence during a trial. However, little scientific attention has been paid to the direct communication which the attorney has with the jurors after they have been selected and sworn.

While lawyers traditionally stress the value of effective opening statements and closing arguments, researchers have not focused their attention upon these areas for two major reasons: First, opening and closing statements are generally viewed as "just speeches." As such, researchers may find them of less interest than other elements more directly associated with behavioral considerations and assume that openings and closings should be relegated to studies dealing with persuasive messages.

Second, it is difficult to isolate the opening statement or the closing argument from the other elements of the trial. It is particularly difficult to isolate them from the facts of the case or from the evidence that might be admitted. Consequently, studying the effectiveness of an opening statement or closing argument may be limited to a particular speaker or a particular case so that the results would not generalize to a larger population.

The legal literature dealing with opening statements and closing arguments suggests multiple areas of concern. This paper will focus on the following questions which relate specific aspects of communication theory to pragmatic application in the practice of trial law: (1) How important to the trial verdict is the opening statement and/or the closing argument? (2) How important is the individual trial attorney's speech ability to the outcome of the case; in other words, is the more persuasive speaker more effective when effectiveness is measured by client satisfaction or trial verdict? (3) How do communication theories apply to courtroom practice? (4) What is the tripartite effect in final argument which allows the plaintiff to speak both before and after the defense attorney? (5) What is the effect of placing time limitations upon the presentation of opening statements or closing arguments, especially in complex cases?

How important is the opening statement and/or closing argument?

Lawyers generally believe that the two occasions when they have the opportunity to address the jury directly are of vital importance to the case. While they might argue as to which is more important, they agree that a good lawyer will take advantage of these opportunities to "sell" the case to the jury.

Attorney Alfred S. Julien, past president of the Association of Trial Lawyers of America and adjunct professor for the New York Law School, argues:

> Most trial lawyers think of summation as the most important part of the trial. It is, indeed, the star attraction. But many jurors' minds, despite the admonition of the trial judge, are well made up by the time summation arrives.[1]

He further claims:

> An opening statement can win the trial of a lawsuit. Delivered forcefully, magnetically, intelligently and emotionally, opening statements are an excellent conduit for success. Jurymen, in cases tried by effectual advocates, have been prone to say that once the opening statements were made there was nothing left to the case.[2]

Support for these statements is found in the report of the 1958 results of the Jury Project of the University of Chicago which states that in eighty percent of the cases the verdict which the jurors would have returned immediately after listening to the opening statements is the same verdict they returned at the end of the trial.[3] Unfortunately, the Chicago Jury Project was designed so that the first measure of the jurors' attitudes toward favoring one side or the other was made after the opening statement. Other research conducted utilizing trial simulations suggests that this result occurs not because of the effectiveness of the opening statement but rather because the jurors' minds are "made up" (1) from the moment they enter the courtroom (they reach the decision based upon their interpretation and perception of the case issues as filtered through their biases and prejudices which result from their life experiences or attitudes), or (2) from their first impression of the case as told to them by the judge in reading the complaint and answer or (3) from the impressions and commitments obtained during voir dire.[4]

Before any valid conclusions can be drawn concerning the importance of the opening statement as measured by its influence on the final verdict, more research must be conducted to determine how jurors process information in order to arrive at their decision (verdict). It would appear that special attention should be placed on determining the decision-making process that jurors follow, especially in evaluating how they interface their pre-trial judgments with the evidence or arguments they hear in trial.

Since opening statements are limited by the United States Supreme Court to informing "the jurors concernings the nature of the action and the issues involved and to give them an outline of the case so that they can better understand the testimony,"[5] most attorneys feel that the real opportunity to persuade the jurors comes with closing argument. This is especially true for attorneys who specialize in civil law rather than criminal law. In criminal cases the jury has only one decision to make--is the defendant guilty or not guilty? However, in a civil case there are really two levels of decision-making; the attorney must not only face the problem of "fault" or liability but must also deal with the question of damages. Experienced trial attorneys who specialize in plaintiff's work generally feel that it is in summation that they are able to move the jurors to award more significant amounts of compensation.

Since many states do not allow the attorney to mention the amount of compensation sought in a civil lawsuit either in voir dire or opening statements, the juror must initially translate references to "a significant amount" to fit with his or her own concept of how much money is "significant." Attorneys often feel that this is tied to the individual's own income, so that they seek "high class jurors" who have more education, income and position in the community for a case "wherein large money damages are being prayed because this type of juror understands this kind of money."[6] Is it probable that the jury forms a concept of how much money would be full, fair and adequate compensation by the end of the opening statement? Or is it more likely that they wait to hear the evidence that supports the request and to respond to the final arguments, especially on pain and suffering or loss of enjoyment for life, concepts that are much harder to quantify with a monetary value?

The contention that summation can be used to increase amounts of compensation has never been tested although it would appear to be a relatively easy matter to examine. If the final arguments persuade the jury to award the amount of compensation that is "full, fair and adequate," then the more effective presentation should result in a higher verdict. Of course, an "effective presentation" as it relates to the courtroom would have to be defined. This would present a problem but certainly not one that is insurmountable.

At this time, there is no conculsive evidence that supports the contention that either speech opportunities are the "win or lose" propositions they are touted to be. In fact, there is no evidence that supports the contention that they are significant elements in the trial process. Much study has to be conducted before questions about the importance of opening statements or closing arguments can be intelligently answered.

How important is the individual trial attorney's speech ability to the outcome of the case?

Textbooks used by law students to prepare for the courtroom acknowledge the importance of good speech skills. For example, one test on trial advocacy instructs the reader that the closing argument:

> should meet the test of any good persuasive effort. Those universal rules developed over the ages by debaters and rhetoriticians merit the

> study of anyone seeking to become an effective advocate but we will not incorporate such universalities here. We shall limit ourselves to those unique circumstances which characterize the legal process.[7]

Former Supreme Court Justice Tom Clark in a conversation with a communication researcher stated:

> Most trial attorneys are knowledgeable of the law. Many, however, don't communicate well in the courtroom. They don't know how to construct persuasive oral arguments and don't know what kinds of techniques influence a judge or jury, so they try all sorts of things and take up a lot of time sometimes getting both themselves and their clients in trouble.[8]

Obviously, while there ought to be a great deal of interest in the techniques of communication, especially those of persuasion, law schools are not providing those students who are interested in trial work with the appropriate background. Law schools readily admit that they don't meet this burden but they also are quick to point out that it really is a small minority of their graduates who will ever take part in a trial. Furthermore, they argue, somewhat falsely, only students with a background in speech or debate or who have better-than-average speech skills will be attracted to the courtroom practice. Indeed, few attorneys actually become trial lawyers. According to Paul Wice, ninety-seven percent of the 110,000 attorneys who call themselves trial lawyers go into the courtroom to try a case less than two times a year. Of these, approximately only 15,000 to 20,000 accept criminal cases "more than occasionally."[9]

The neglect of adequate speech instruction has resulted in an abundance of criticism of the lawyer's speech skills. Chicago Judge Alan E. Morrill, author and past president of the Court Practice Institute, complains, "It is common to find lawyers making a dull, tedious, and disjointed representation of the facts."[10] Attorney and lecturer Robert L. Simmons agrees:

> Of the various stages of trial, the opening statement is the most abused by the average lawyer. He does not appear to believe in it, does not prepare it thoroughly, does not deliver

> it well; in an appreciable number of cases, does not deliver it at all. This disdain for what is an important weapon in a trial lawyer's arsenal of persuasion marks one reason why these lawyers are what they are . . . average.[11]

Plaintiff's attorney and law professor Martin W. Littleton adds his criticism:

> Too many lawyers think that courtroom practice calls for actors and accordingly they try to inject histrionics into their efforts. This is likely to be a sickeningly transparent device which destroys whatever good might otherwise have been accomplished. There are few, if any, trial lawyers who are good enough actors to deceive a jury of average laymen by their conduct.[12]

Even while deriding the abilities of the trial attorney to perform in the courtroom in the delivery of impressive openings or closings, the critics offer advise on how to be effective. Judge Morrill declares:

> Fortunately, self-improvement in giving an opening statement comes quickly since it is the easiest phase of the trial in which to develop proficiency. The principal reason for this is that one does not need the gift of a quick mind that can seize upon an opportunity that comes and goes in a moment, such as occurs during the taking of evidence. All that is required is that the representation of facts be given in a clear manner. Anyone with a voice that can be heard can, by advance preparation . . . put together an effective opening statement.[13]

Nor does he find the closing argument to be any more challenging:

> For summing up the evidence, a lawyer should develop a pattern and routine to make certain that he has covered the essentials. With the benefit of an outline, an experienced trial lawyer can with minimal preparation make an effective closing argument that will last well over an hour.[14]

Even if the trial attorney turns to the rhetorician or debater as instructed by the trial advocacy texts, she is unlikely to find any specific advise. This is partly true because of the decline of investigation concerning principles of persuasion. Miller and Burgoon discussed this recent lack of interest in doing traditional message effectiveness or persuasiveness research in 1978 but have not been successful in encouraging a reestablishment of this line of research.[15] Professors Fontes and Bundens review the use of persuasion during the trial process, commenting that communication scholars "are especially qualified to assess the effectiveness of the various persuasive techniques used by legal practitioners within the context of the trial process."[16] They specifically identify the persuasive techniques that could be used during voir dire and then generally review those that occur "during the trial" or "during deliberation proceedings." At no time do they refer to opening statements or closing arguments nor do they offer any general speech guidelines in how to use persuasion. This same pattern is repeatedly found in communication literature.

Little specific advice is available to the attorney who wants to improve his or her persuasive techniques. One pamphlet suggests that the attorney join Toastmasters to improve the ability to communicate in an organized speech before a lay audience. Other articles generally advise the attorney to learn to speak without notes, to use appropriate gestures, to develop a style that demands the attention of the jury, to be conversational, to be sincere and emphatic. Yet when Gunderson and Hopper examined the relationship between speech delivery and speech effectiveness as measured by recall-comprehension, attitude change and ethos (intrinsic believability of the speaker), they found that "effective content served . . . to mask the effects of ineffective delivery."[17]

This might suggest that the attorney who has good content would be effective in persuading the jury even though good delivery techniques are missing. Conversely, other research suggests that effective delivery styles will mask the lack of good content.[18] With jurors, which is more important--content or delivery? When the content is not particularly persuasive, can effective delivery compensate? Research that specifically addresses these issues would be most beneficial.

Norton examined teacher effectiveness as it was influenced by communicator style. Twelve variables were examined. These measured whether the communicator was dominant, dramatic, contentious, animated, impression-leaving, relaxed, attentive, open, friendly or had an effective voice. In addition, it measured the overall communication image. Norton concluded that teachers who were attentive, impression-leaving, relaxed, friendly and precise were more effective than teachers who did not possess these components.[19] Many attorneys view their duty in the courtroom as a teaching process with the jury as their students. Therefore, could these findings be generalized as applying to the trial attorney? Or does the added burden of advocacy alter juror expectations so that other components become more important? No research has been done to examine these questions.

A fascinating area of study which offers great challenge to the courtroom performer is that of language intensity. Bowers defines this as "the quality of language which indicates the degree to which the speaker's attitude toward the concept deviates from neutrality."[20] McEwen and Greenberg state that a speaker was found to be more dynamic when intense language was used.[21] On the other hand, Bowers' findings indicate a "boomerang effect" which leads to an attitude change in the opposite direction desired when the language employed was perceived by the listener as being overly intense.[22] To further complicate the issue, attorneys worry that jurors have been conditioned to expect the drama of the courtroom projected in the movies or on television. Did Paul Newman in his Oscar-nominated role in The Verdict set a standard that the courtroom attorney must match? Do jurors expect the dramatic style and delivery of a Perry Mason in every trial? If these expectations exist and are not met, does the juror view the attorney as less competent and, therefore, as less deserving of winning in the courtroom? These are other areas that research should address.

Cronkhite and Liska state that:

> People choose to participate in the process of persuasion with others who are most likely to satisfy needs and achieve goals which are most salient and important at the moment of choice. . . But suppose we give a bit more thought to the phenomena of mass media and public speaking. Do listeners always attend to public speakers and television commercials because they consider the sources to be believable? Sometimes that is the reason, of course, but persuasion in such formats also proceeds as a matter of mutual need satisfaction. Sometimes the listener's needs are satisfied by sources who are competent and trustworthy, but frequently they are not; likeability, novelty and entertainment are often valued more highly.[23]

What implications do these statements contain for the trial attorney as the opening statement and closing argument are organized? Should the attorney plan to entertain or to consider ways in which a novel experience can be enjoyed by the jury panel? If she is successful in entertaining the jurors or in providing a novel experience, will she be more likely to win her case? Only well-conducted research could provide a definitive answer to these questions.

In reviewing each of these areas, it becomes obvious that the attorney, along with other platform speakers, is faced with a multitude of questions, many of which can be answered at the present time only by "instinct" or "old lawyer's advice" or public speaking textbooks. Until communication scholars have been successful in designing research projects that address these areas, lawyers must continue to operate from guesswork. How much harm this does to the quest for justice is unknown. However, the seriousness of these questions does provide an interesting challenge to communication researchers.

How do communication theories apply to courtroom practice?

There is no doubt that there are several areas of research that have been conducted by communication scholars which could be of interest and assistance to the trial attorney. Many of these theories have been applied to the area of voir dire but they have not been examined from the viewpoint of the attorney's presentation of either the opening statement or closing argument.

How persuasive are facts, evidence and testimony? Burgoon and Bettinghaus state that they "think the study of evidence has been neglected and suggest that a fruitful research program could be mounted in this area."[24] They outline the following areas which would benefit from further exploration: (1) the use of evidence is clearly dependent on the topic of the message yet there are no studies which attempt to outline what kinds of topics would be suitable for particular kinds of evidence; (2) it would be useful to identify some of the interactions between the use of evidence and various audience characteristics; and (3) current classification systems for evidence which are derived from the legal system should be analyzed and compared to behavioral criteria to determine the value of each system.[25] Research in each of these areas would provide valuable guidance to the legal community.

Burgoon and Bettinghaus voice the age-old question: "One of the oldest controversies in communication is whether a persuasive speaker is better advised to construct messages based on people's emotional needs or their rational bent."[26] This echoes the concerns of the law profession. One writer notes:

> The importance of final argument or summation in the trial of a case is very great, even though there has been an increasing tendency in recent years to underestimate its value. Lawyers sometimes minimize its importance because they think the final argument is merely an appeal to the emotions or prejudice of a jury.[27]

Actually, few lawyers or communication scholars would argue that jurors behave totally "rationally" or "emotionally." In fact, most people will accept that there is some combination of logic and emotion that is utilized in the decision-making process. Trial simulation research supports the fact that jurors state, in self-report, that they are not as responsive to emotional appeals as to logic and evidence. However, this same research reveals that, in civil cases, when the jury is considering pain and suffering or loss of enjoyment of life, emotional appeals result in verdicts which are triple the amount of compensation that is awarded with the emotional "pitch" in closing argument.[28] On the other hand, there is a sufficient amount of research in personality areas that one could conclude that people of different occupations or educational backgrounds might respond differently to emotional appeals.[29]

Research by Kalven and Zeisel reported in their book, The American Jury, suggests that juries may operate on the basis of emotion or prejudice. In their study, Kalven and Zeisel evaluate judges as critics of the jury system; they report that judges were critical of juries' performances in only nine percent of the cases.[30] The researchers principally equate judges' dissatisfaction with juries' decisions with verdicts that were reached on "values alone." They asked the judge to classify his disagreement as based on facts, values or facts and values. They report that the judge was "seriously critical" of 78% of the verdicts reached by the jury on "values alone."[31] They conclude:

> The judge is least critical of the jury's performance when, being a pure finder of facts, it ends up disagreeing with him. He is most critical of its performance when in the teeth of the facts, it gives reign to its own sense of values. And, finally, when the jury is engaged in what is perhaps its most distinctive activity, responding to values in the course of resolving ambiguous questions of fact, the judge is again not seriously criticial.[32]

Kalven and Zeisel admit they are operating under the assumption that the judge is responsive to law and evidence, i.e., logic and rational thought, while the jury might be acting in response to emotion or prejudice.

While juries appear to be responsive to emotional appeal, no research to date has been conducted to attempt to validate how often the jury operates from an emotional basis or when emotional appeals become the decisive factor. Such research would be well within the framework of rhetorical analysis performed by the rhetorician or communication scholar and would be extremely beneficial to the legal field. Not only would it provide a guideline for the lawyer to use in determining when it is appropriate to use an emotional appeal but it would provide a frame of reference for the judge in the forming of expectations for jury performance. This type of research might also provide the basis for deciding when it is appropriate to seek a bench trial rather than a jury trial.

Several communication theories suggest interesting areas of potential application in the organization of opening statements and closing arguments. Each of these theories, however, need further exploration before the value of their utilization can be determined.

Ingratiation theory is one such area of interest. Morrill instructs attorneys that "some expression of appreciation to the jurors for having fulfilled their function" should be expressed at the beginning of closing argument but warns them that they should not "compliment them too profusely or they will feel you are trying to curry favor with them--a flowery speech about the glorious task they have done will do more harm than good."[33] Fontes and Bundens, in their review of the literature in this area, describe ingratiation theory as securing a desired benefit from that target.[34] This certainly describes what the lawyer is attempting to do. However, Morrill's warning contains the "ingratiator's dilemma," as described by Jones and Wortman: this strategy can backfire when the ingratiation is obvious.[35] Does the jury respond to statements of appreciation? How much appreciation can be shown to the jury by the attorney without backfiring? If the first attorney to address the jury tries ingratiation, should the opposing attorney reveal to the jury what has occurred, should he use ingratiation himself or should he ignore it all? What is his best strategy? No research has been conducted that would serve as a guideline in answering these questions.

Immunization and commitment strategies potentially offer an interesting opportunity for trial attorneys to induce resistance to persuasive techniques that might be employed by the opposition. Miller and Burgoon conclude that "the evidence clearly demonstrates that forcing a person to publicly commit himself to a belief is an effective way to increase resistance to subsequent persuasive apeals."[36] Attorneys are advised to try to get jurors to commit themselves during voir dire to follow the law, to be fair in their review of the facts and in their deliberations, to overcome their particular prejudices and biases that concern case issues, and to wait until the end of the trial before they reach any conclusions about the verdict.[37] Once such commitments are obtained, the attorney reminds the jurors of these promises in his/her closing argument as a way of reinforcing the argument and reducing the "impact of emotional appeals made by the opposing attorney."[38] However no research has been conducted that would validate this advice.

Anchoring techniques as studied by Abelson and Rosenberg[39], Bennett[40], Carlson[41], and McGuire[42] might also be valuable for use in opening statements and closing arguments. Anchoring would involve the linking of beliefs that the attorney uses as support for case issues to beliefs already held by the jury. Anchoring differs from commitment strategies in that no public commitment from the jurors would be sought--the attorney simply "plugs in" the arguments to the beliefs she perceives exist within the community or within the personality types present on the jury panel. Again, no research has been performed that would verify whether anchoring could be used effectively.

Much of the research that has been referred to has been performed with a mix of active and passive audiences.[43] Obviously the jury constitutes a passive audience who becomes active only during the deliberation process. What is the impact of this passiveness on the communication and persuasive strategies that the attorney might employ? This is yet another area that could benefit from research by communication scholars.

What is the tripartite effect in final argument which allows the plaintiff to speak both before and after the defense attorney?

Since the concept of primacy and recency was introduced, attorneys have pondered the advantages or disadvantages of having the first or last word. Judge Morrill argues that, "Inasmuch as the burden of proof rests with the plaintiff, it seems that fair play has established the practice of granting the plaintiff the right to open and close the summation."[44] Legal history supports the concept that lawyers and judges have generally believed that the advocate who speaks last has the advantage. Since the side who has the burden of proof is considered to be at a disadvantage, the right to speak last was given to that side to offset the disadvantage of carrying the burden of proof. The plaintiff in a civil case or the prosecutor in a criminal case has the right to speak first to the jury in opening arguments and, in most states, the right to speak both first and last in closing arguments. This order of presenting closing arguments is referred to as the tripartite or "sandwich" effect.

Attorney Lawson complains that the tripartite order is "unfair to the defendant" and seeks to omit the rebuttal speech opportunity that is generally given to the plaintiff or prosecutor. He declares:

> The net result is that there is a greater change in opinion toward the position of the first communication, because of both primacy and recency effects operating for the party presenting first and last, than if there were only two communications.[45]

Judge Morrill believes that there is "no question that this [tripartite effect] has two distinct advantages." The first advantage comes from having the right to help the jury to reach an important decision which is "hard work" for them--in return for offering them a persuasive argument, they "will in good conscience go along with the plaintiff" and "will not want to be brought back to the point of indecision by the defense attorney . . . " In fact, the jurors will resist facing again the "struggle of making a correct decision." The second advantage is that the plaintiff is the last one to review and analyze the evidence for the jurors and to offer rebuttals to all the arguments that have been offered by the defense.[46]

How does the tripartite order which combines both primacy and recency effects balance the burden of proof? Or does it offer a balancing effect at all? Is it an unfair advantage for either the plaintiff or the prosecutor? There is a special concern voiced in criminal cases. Many defense attorneys argue that the burden of proof, contrary to what is guaranteed to the defendant in the Constitution, no longer lies with the prosecution but has shifted to the defense. They feel that the general public accepts the assumption that arrest of the innocent is uncommon in this society; the final effect of this is "arrest equals guilt." Criminal defense attorneys argue that it is more the burden of the defense to prove the defendant did not commit the crime as charged rather than the burden of the prosecution to prove "beyond a reasonable doubt" that the defendant is guilty. If this claim is true and if the tripartite effect does present a distinct advantage, then the rights of the defendant are being unfairly diminished. Certainly this research area would appeal to either the communication scholar or the behavioral researcher.

What is the effect of placing time limitations upon the presentation of opening statments or closing arguments, especially in complex cases?

Communication scholars have been concerned with evaluations of the effect of information overload as well as the complexity of information and how an audience relates to it. However, no serious work has examined the effect of time limitations on the presentation of information, regardless of the nature of the information or its complexity.

Time limitations are an increasing threat to the trial attorney. With the ever-growing case load burdening the nation's legal system, court administrators are constantly searching for ways to shorten the amount of time set aside for each trial. Especially in the federal court system, one solution to this time factor has been to shorten the length of time allowed for opening statements or closing arguments. All too frequently, the attorneys are asked to complete their address to the jury in twenty minutes.

Many attorneys are concerned that this limitation does not allow them an appropriate amount of time to outline their cases to the jury. They therefore complain that an administrative concern is outweighing the concerns of justice. They feel the need for at least an hour to present their opening or closing to the jury. Indeed, it is not uncommon for Melvin Belli, F. Lee Bailey or Stanley Preiser to request twenty minutes for every week of trial.[47] When one considers that many cases presented by this trio last two or three months, that's a considerable length of time to spend addressing the jury. Of course, they pride themselves on their delivery skills and, in fact, have built their reputations upon these skills and their trial records.

Judges argue that there is no harm to the client or to the case in shortening the amount of time allowed to the attorneys for their presentations since most of them are, at best, inadequate in their speech skills. Also, there is a general disagreement on how much time it should take to accomplish the tasks of information or persuasion.

The Association of Trial Lawyers of America (ATLA) notes that:

> Judges somestimes limit the time allowed for argument to speed up the trial, ignoring the fact that certain priceless ingredients necessary to justice can come to the jury only in argument. For example, the rules of evidence prevent witnesses from offering their conclusions and reasoning to the jury. . . . The very life stream of justice in most cases depends upon the application of logic and reason to the evidence, and if the lawyer is not afforded ample time to furnish them to the jury, the ends of justice may be defeated.[48]

ATLA actively lobbies the rule-making bodies to obtain liberal rules relating to time limitations. Their literature documents the need for unrestricted time considerations.

Attorney Simons warns the attorney:

> Plan your opening statement for no more than fifteen minutes! If you can compress it into ten minutes, without skimping, so much the better! There is no case that cannot be properly stated in ten minutes and no case that will not be overly stated in twenty-five.[49]

Julien, on the other hand, is more concerned with the individual needs of the attorney and the case:

> The amount of time to be allotted to opening statements cannot be dogmatically fixed. Does the attorney speak rapidly or slowly? Is the case simple or complex? Still, I can suggest some general rules. In a minor case, opening should not be longer than twenty minutes. In a major case, it should rarely exceed forty-five minutes to an hour. Intricate malpractice, products liability, antitrust or securities cases may consume more than an hour.[50]

Melvin Belli contends, "The length of the opening statement should be limited only by the length of time it takes counsel to recount every fact that he is going to prove in that case."[51]

Professor of Law James Jeans is more cynical in his view of the amount of time appropriate for delivery of these speeches. His view is taken more from an audience analysis rather than the needs of the attorney. He notes:

> The time requested will vary with the complexity of the case, but it is well to remember that jurors are conditioned to the thiry minute chunk into which most television offerings are segmented and it is difficult to stretch their attention span beyond the limits of "All in the Family."[52]

Opening statements and closing arguments are somewhat unique as speech situations. Other than voir dire, this is the only time that the attorney directly addresses remarks to the jury. Furthermore, the attorney cannot ask any questions of the jurors nor allow them to ask questions. All of the evidence must be presented after the opening statement and before the closing argument and this is done under the rather artificial format of questions and answers. The lawyer must only address questions to the witness. He is not allowed to comment upon the answers nor explain them, unless this can be accomplished within the framework of a new question. For these reasons, it is easy to see why these speech opportunities are highly valued by the trial attorney and to understand why attorneys are reluctant to face time restrictions of these presentations.

Another unique aspect of the trial situation is that a panel of jurors are selected for their ignorance of the issues involved in the case. Frequently the trial attorney is faced with the need to educate the jury panel so that they will be capable of understanding the testimony on very complex issues totally outside their educational or professional background. Often this requires acquainting them with an entirely new vocabulary. When this is the situation, in the opening statement the attorney must accomplish all the following: explain the process of the trial so the jurors will have an expectation of what will be occurring and why; introduce the nature of the complaint; explain the situation; define the appropriate vocabulary; review the outline of the testimony as it will come into evidence; and explain the theory of the case. In the closing argument, the attorney expects to express some appreciation to the jurors for their attention and service; recall the previous representations made to them in voir dire or opening; review the major issues of the case and the witnesses who testified concerning each of these areas; isolate the areas of conflicting testimony and offer an explanation or theory as to why this conflict exists and how it should be perceived; review the theory of guilt or liability; in civil cases review the damages and offer the argument supporting the return of a verdict favoring the damage theory offered; and cover the law that will be important in reaching a decision in the case. It is certainly understandable that the average attorney views this as a difficult task to accomplish within twenty or thirty minutes. This is especially true if the trial has lasted more than a week.

Can these speeches be presented within a twenty minute framework without limiting the lawyer's communication to the jury? Do speech limitations mar the effectiveness of the trial attorney in presenting the case clearly and persuasively? Is it feasible to expect the average speaker to cover the complex issues identified with medical malpractice, antitrust, securities or products liability cases in twenty or even thirty minutes? Could some of the tasks that the lawyer expects to cover in opening statements or closing arguments be handled more advantageously in another part of the trial? If it is moved to another trial segment, does it save the time that the court administrator desires by shortening opening or closing? These questions present yet another area of research that is of concern to the attorney and is certainly within the area of research for which communication scholars are prepared.

Suggestions for research format

When designing any research project, it is essential to develop a basic design which: (1) meets the needs of the study; (2) is not costly; and (3) which can be compared to other studies on like topics. Since a number of research questions have been proposed in this paper, it seems advisable to propose a universal format which would be applicable in the exploration of each issue.

The most problematic area in legal research is studying the opening statement and closing arguments as part of a trial, rather than as separate entities. A pressing question in legal areas is: "Does changing a component of the opening or closing make a difference in the trial verdict?" Therefore, the most useful research will examine these speech occasions as they contribute to a favorable verdict; the measure of the value or effectiveness of a component of the opening or closing would be the degree of alterations that is achieved in the verdict.

For this reason, a civil case, which deals both with liability and damage issues, offers the best opportunity for accurate evaluation. Since the verdict could vary from zero dollars to multi-millions of dollars, an unlimited range of measures is available rather than the either guilty or not guilty verdicts offered by criminal trials. "Jurors" could be exposed to the trial without the benefit of either opening or closing speeches and report their verdict. Openings and closings could be included in various combinations to measure how they affected the jurors' understanding of the case or appreciation for the arguments concernings the theory under which the attorney has prepared the case for trial.

To facilitate comparative analysis and add to the generalizability of the results, one civil case should be chosen. The case selected should be one that is truly controversial so that there will be facts to support either party. In other words, the verdict, no matter whom it favors must be perceived as rational. The case should also be one which is complex but has case issues which are easy to identify. Either a products liability or medical malpractice case would offer interesting possibilities as long as the case is limited to one between two parties (no multiple plaintiffs or multiple defendants or cross-action complaintants) and to the rules of evidence and argument which govern strict liability rather than comparative liability. The use of comparative liability might be reserved for a later stage of the research since it offers another measure of effectiveness in that not only are liability determined and damages assessed, but each party is assigned a percentage of responsibility or fault for the negligence that lead to the damage. (Under the comparative negligence law, the jury could find that the damages were $150,000 with the plaintiff contributing one-third of the negligence and the defendant two-thirds. Therefore, the plaintiff would receive $100,000 for the damages.) But this type of law complicates unnecessarily the need for jurors to understand their deliberation process and the laws of liability, and should be saved as a refinement measure for those components that receive mixed evaluations after the early research is completed.

Obviously, to use an actual trial is not feasible, especially if any type of replication is desired. While there are some reservations concerning the use of trial simulation[53], this is the best available methodology, especially since the Supreme Court forbids the observation or interviewing of jurors during actual deliberations.

Videotape offers an attractive mode for presentation of the case to the "jury". Miller and Fontes state that "preliminary findings suggest that video production techniques do not exert dramatic effects on juror perceptions of trial participants, nor the ultimate outcome of civil litigation."[54] The use of videotape facilitates experimental control and replication. Also, it creates the illusion of the courtroom atmosphere.

Once the decision has been made to use videotaped presentations, the trial should be divided into the various components underlying the trial structure. Of course, some components do not lend themselves easily to videotape techniques. For instance, aspects of individual juror voir dire would have to be conducted either in some written format or in person since much of the voir dire process depends upon the interaction of potential jurors and attorneys. Components of voir dire which could be videotaped would include opening comments or questions that are addressed to the panel as a whole. This part could be videotaped and played back with the use of a pause button so that the researcher would have sufficient time to record the responses of the jurors. Trial components that would be individually videotaped would be (1) reading of the complaint and answer by the judge or short summary of the case issues by the judge; (2) general voir dire of the entire panel; (3) swearing in of the jurors; (4) opening statement by the plaintiff; (5) opening statement by the defendant; (6) listing of case facts to which both sides stipulate; (7) presentation of the witnesses for the plaintiff with cross examination by the defense; (8) presentation of the witnesses for the defense with cross examination by the plaintiff; (9) closing arguments by the plaintiff; (10) closing arguments by the defense; (11) rebuttal by the plaintiff; and (12) presentation of the judge's instructions of the law as it is applied to this case. The measure that would be used to evaluate the results would be the individual juror's verdict at the end of each trial component and the final verdict at the end of the jury's deliberation.

Segment six, the listing of case facts to which both sides stipulate, occurs only in unusual situations in an actual trial. However, adding this segment to the simulation would limit the issues of concern to the jury and thus simplify the simulation.

Presentation of witnesses is perhaps the most difficult aspect of the simulation since the testimony must be limited in order to present the trial within a time frame that makes it possible to obtain volunteers. Certain portions of the testimony, such as the credentials of expert witnesses, could be stipulated to or summarized. In the trial presentation of a medical malpractice case, the witnesses for the plaintiff's side could be limited to the plaintiff, a member of the plaintiff's family, a nurse, one expert medical witness, and an economist who would present the damage portion of the case. The defense side could present even fewer witnesses: the defendant, two expert medical witnesses, and an economist who will question the damages presented by the plaintiff's side. Each of these witnesses would be limited to brief presentations; in trial simulations, it is not uncommon to present a witness in ten minutes. The total time involved with viewing all of the videotaped segments should not be more than two or three hours, thus allowing an additional hour or so to take the measures and have the jury deliberate.

Once the case has been selected, the facts identified, and the basic videotaped segments are scripted and taped, the actual research design can be adjusted to facilitate researching the particular question of interest. The effect of the other case segments without the influence of the opening statements or closing arguments should be established as a base line with which to compare the effect of these two speech occasions. The trial could then be run with only opening statements, or only closing arguments or with both present. The speech opportunities could be performed by different trial attorneys. Lawyers with illustrious reputations as master trial advocates, such as Melvin Belli, F. Lee Bailey, Stanley Preiser, Jerry Spense, or Racehorse Haynes, could present openings or closings, as could lawyers who have local reputatons for excellence or average attorneys who try only one or two cases each year.

Is there a difference in the content they select? Is there a difference in the verdicts they get? Only the imagination of the researcher would provide limitations to the variations that could be examined since there is, in reality, no limit to the alteration of form, content, technique, delivery or speaker that could be used in the opening statement or closing argument segments.

Conclusion

One of the reasons that behaviorists and scholars have become increasingly interested in studying the problems of the legal system is that it offers both an intriguing area of study and the opportunity to have impact on problems that affect every level of our society. Communication researchers do have the particular skills and qualifications that allow them to offer a unique service to those in the legal arena. To accept the challenge and perform this research will be of benefit as it broadens our understanding of the communication process while at the same time answering some of the questions facing the trial attorney in the informing or persuading role.

FOOTNOTES

V. Hale Starr, Ph.D., President, Starr & Associates, Inc., 3650-68th, Suites A&B, Des Moines, Iowa 50322. Special appreciation is expressed to Lin S. Lilley and Donna Siers for their assistance with this paper.

[1] Alfred S. Julien, Opening Statements (Wilmette, Illinois: Galligham and Company, 1982 Cumulative Supplement), p. vii.

[2] Julien, p. 1-1.

[3] D. E. Broeder, The University of Chicago Jury Project, Nebraska Law Review, 38 (1958), 744-761.

[4] V. Hale Starr, unpublished trial simulation results, 1977-1982.

[5] United States v. Dinitz, 424 U.S. 600, 612, 96 S.Ct. 1075, 1082, 47 L. Ed.2d 267 (1976), reh. denied 542 F.2d 1174 (5th Cir.) cert. denied 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (Burger, C. J., concurring). See also Gillson v. Gulf, Mobile & Ohio R. R. Co., 42 Ill.2d 193, 246 N.E.2d 269 (1969).

[6] Melvin M. Belli, Modern Trials, Volume One, (Indianapolis: Bobbs Merrill Company, Inc., 1954) p. 816.

[7] James W. Jeans, Trial Advocacy (St. Paul, Minnesota: West Publishing Co., 1975), p. 368.

[8] Norman E. Frontes and Robert W. Bundens, "Persuasion During the Trial Process," in Michael E. Roloff and Gerald R. Miller, editors, Persuasion: New Directions in Theory and Research (Sage Annual Reviews of Communication Research, Beverly Hills: Sage Publications, 1980), p. 251.

[9] Paul B. Wice, Criminal Lawyers (Beverly Hills: Sage Publications, 1978), p. 29.

[10] Alan E. Morrill, Trial Diplomacy (Chicago: Court Practice Institute, 1971), p. 22.

[11] Robert L. Simmons, "How to Make Effective Opening Statements," Winning to the Court (Englewood Cliffs, New Jersey: Executive Reports Corporation, 1979), p.309.

[12] Martin W. Littleton, "Opening to the Court or Jury," in Bodin, editor, Civil Litigation and Trial Techniques, (New York, Practicing Law Institute, 1976), p. 176.

[13] Morrill, p. 22.

[14] Morrill, p. 86.

[15] Gerald R. Miller and Michael Burgoon, "Persuasion Research: Review and Commentary," in B. D. Ruben, editor, Communication Yearbook II, (New Brunswick, New Jersey: International Communication Association, 1978).

[16] Fontes and Bundens, pp. 249-266.

[17] D. F. Gunderson and Robert Hopper, "Relationships Between Speech Delivery and Speech Effectiveness," Communication Monographs, 43 (June, 1976), 158-165.

[18] F. H. Knower, "Experimental Studies of Changes in Attitudes: I. A Study of the Effect of Oral Argument," in Journal of Social Psychology, 6 (1935), 315-347.

[19] R. W. Norton, "Teacher Effectiveness as a Function of Communicator Style," in B. D. Ruben, editor, Communication Yearbook I, (New Brunsiwck, New Jersey: Transaction Books, 1977).

[20] John Waite Bowers, "Language Intensity, Social Introversion and Attitude Change," in Speech Monographs, 30 (1963), p. 345.

[21] W. J. McEwen and B. S. Greenberg, "The Effects of Message Intensity on Receiver Evaluations of Source, Message and Topic," in The Journal of Communication, 20 (1970), 340-350.

[22] Bowers, pp. 395-352.

[23] Gary Cronkhite and Jo R. Liska, "The Judgment of Communication Acceptability," in Michael E. Roloff and Gerald R. Miller, editors, Persuasion, pp. 101-140.

[24] Michael Burgoon and Erwin P. Bettinghaus, "Persuasive Message Strategies," Persuasion, p. 147.

[25] Burgoon and Bettinghaus, pp. 146-148.

[26] Burgoon and Bettinghaus, p. 143.

[27] Robert M. Dudnik and James J. Leonard, Jr., editors, Anatomy of a Personal Injury Lawsuit, (Washington, D.C.: Association of Trial Lawyers of America, 1980, p. 173.

[28] Starr, unpublished research.

[29] Floyd L. Ruch, *Psychology and Life*, (Chicago: Scott, Foresman and Company, 1963), pp. 450-460.

[30] Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1971), pp. 428-433.

[31] Kalven and Zeisel, p. 432.

[32] Kalven and Zeisel, p. 432.

[33] Morrill, p. 86.

[34] Fontes and Bundens, pp. 249-266.

9

[35] E. E. Jones and C. Wortman, *Ingratiation: An Attributional Approach* (Morristown, Pennsylvania: General Learning Press, 1973).

[36] Gerald R. Miller and Michael Burgoon, *New Techniques of Persuasion* (New York: Harper & Row, 1973), p. 28.

[37] V. Hale Starr and Mark McCormick, *Scientific Methodologies of Jury Selection* [working title] (Boston: Little Brown & Company, in press).

[38] Fontes and Bundens, p. 256.

[39] R. P. Abelson and M. J. Rosenberg, "Symbolic Psychologic: A Model of Attitudinal Cognition," *Behavioral Science*, 3 (1958), 1-13.

[40] E. Bennett, "Discussion, Decision, Commitment and Consensus in Group Decisions," *Human Relations*, 8 (1955), 251-274.

[41] E. R. Carlson, "Attitude Change Through Modification of Attitude Structure," *Journal of Abnormal and Social Psychology*, 52 (1956), 256-261.

[42] W. J. McGuire, "The Nature of Attitudes and Attitude Change," in G. Lindzey and E. Aronson, editors, *The Handbook of Social Psychology*, 3 (Reading, Maryland: Addison-Wesley, 1969).

[43] Michael Burgoon and L. B. King, "The Mediation of Resistance to Persuasion Strategies by Language Variables and Active-Passive Participation," *Human Communication Research*, 1 (1974), 30-41.

[44] Morrill, p. 87.

[45] John Lawson, "Order of Presentation as a Factor in Jury Persuasion," Kentucky Law Journal, 56 (1968), 523-552.

[46] Morrill, pp. 87-88.

[47] Stanley Preiser, "Persuasion in Trial," presentation at Association of Trial Lawyers of America, New Orleans, Lousiana, November, 1979.

[48] Association of Trial Lawyers of America, Anatomy of a Personal Injury Law Suit, (Washington, D.C.: ATLA, 1980), p. 173.

[49] Simons, p. 163.

[50] Julien, pp. 1-9.

[51] Melvin Belli, Trial Techniques (Indianapolis: Bobbs-Merrill Company, 1965), pp. 7-70.

[52] Jeans, p. 372.

[53] Robert M. Bray and Norbert L. Kerr, "Methodological Considerations in the Study of the Psychology of the Courtroom," The Psychology of the Courtroom (New York: Academic Press, 1982), pp. 287-324.

[54] Gerald R. Miller and Norman E. Fontes, Videotape on Trial (Beverly Hills: Sage Publications, 1979), p. 214.

OPENING STATEMENTS AND CLOSING ARGUMENTS: A RESPONSE FROM THE COMMUNICATION PERSPECTIVE

RAYMOND W. BUCHANAN

The papers concerning opening statements and closing arguments which have preceded this one have been thorough and enlightening. Benoit and France have adequately sketched the research efforts, both from the social sciences literature and from the legal journals. Dr. Starr has identified certain theoretical considerations and research needs in opening statements and closing arguments. Finally, Don Peters has given us an excellent perspective from the legal profession of strategies and research on opening statements and closing arguments.

From my perspective, the purpose of this response paper is not to serve as critic nor to rehash what has already been said. I want to do something that I rarely have an opportunity to do - that is, play philosopher. While I am a pragmatist by nature and necessity, occasionally I like to indulge my fancy and just play with ideas. So, that is what I intend to do, even though I recognize that perhaps all has already been said which needs to be said about this subject.

A little more than ten years ago, I received a summons to appear for jury duty at the Seminole County Court House in Sanford, Florida - that's the eighteenth judicial district of Florida. Like most citizens called for jury duty, I had, at the time, little knowledge of the court system and how it works. I had previously attended one trial in the State of Tennessee, but most of what I thought I knew about the court system came from what I has seen on television. It was with some feelings of anxiety and awe that I walked into the courtroom on that first morning. I wasn't quite sure what to expect - but then, neither did anybody else. Little did I know that what was about to happen was going to play a significant part in changing the course of my academic experiences.

To make a long story short, I was selected foreman of the jury. The trial involved testimony which was ugly, distasteful and complex. Emotions ran high. From the moment of opening statements through three days of testimony, the attorneys appeared volatile and pursued their tasks with a vengeance. The closing arguments appeared vague and at times disjointed. Finally, the time came for the judge to instruct the jury and each juror breathed a sigh of relief because we knew that this friendly, robed, father-figure would put it all together for us and make it easy to reach a decision. To say the least, we were a bit naive because the instructions were, in places, almost incomprehensible.

We did reach a decision - guilty - and I think it was a good one. But we had to struggle for hours and hours through literal agony to wade through tons of information and arguments to finally reach that decision.

Needless to say, as a person deeply involved in communication studies, I spent the next couple of weeks seriously reflecting upon the trial as a communication process. By my own experience, I knew that there were serious problems but I didn't know how to even begin to adequately study the process because at that time in Florida the courtroom was virtually closed to researchers.

Then, out of the blue came a letter to me from Judge David Strawn of the eighteenth judicial district of Florida. He wanted to know if I would assist him in a study of communication behavior between judge and jury. Talk about manna from heaven - the door was open and the way was clear for me and my colleagues at the University of Central Florida to delve into a concentrated study of courtroom communication. The study started with a three year LEAA grant to improve jury instructions in Florida. Beyond that, over the past ten years, we have had opportunities to examine nearly every area of the trial process, from pre-trial preparation through jury deliberation behavior.

The Importance of Opening Statements and Closing Arguments

During this period of intensive courtroom research, we have had numerous opportunities to both observe opening statements and closing arguments, and to discuss these trial events with judges, attorneys and jurors. Out of my own observations and discussions, and from the three papers delivered on this topic at our conference, it becomes increasingly clear that those who have given careful thought to opening statements and closing arguments conclude that they occupy a place of supreme importance to the over-all impact of the trial. Academicians, attorneys, judges, citizen jurors - nearly all are adamant in their agreement to this premise.

So, we know opening statements and closing arguments are important - at least that appears to be most everybody's perception - yet most academicians and lawyers are not satisfied with that seemingly simplistic observation. Locked within the soul of every researcher is that intense desire to quantify! "I know opening statements are important, but just how important are they? In the average trial, what percentage of the total impact of the trial can be attributed to the opening statement; to closing arguments?" etc.

Dr. Starr in her excellent paper, concluded that "there is no evidence that supports the contention that they (opening statements and closing arguments) are significant elements in the trial process." By that statement I suspect she means that no one has been able to quantify the significance of opening statements and closing arguments to the entire trial process. And of course, that is an accurate statement. However, most participants in the process - judges, attorneys and jurors - (as Dr. Starr points out) perceive that they are important, and from a philosophical point of view, that makes them important. We can't deny that perception may be more important than reality. I don't think we will ever be able to truly quantify the impact of opening statements and closing arguments, because it probably varies from trial to trial. In a way, it's like trying to quantify which position on a basketball team is the most important. All trial segments serve some function which is perceived to be important to one degree or another. Perhaps we would be advised to take into account the stated functions of each trial segment and determine if we are serving those functions, rather than trying to ascertain some quantifiable measure of how much each function impacts the process. Basically, I am suggesting that we should look at the trial as a system of resolving conflict, and not as a series of totally unrelated events. In his recent article on opening statements, William Trine, a practicing attorney in Colorado, observed:

> "The opening statement is an integral part of the trial, the trial plan, and trial preparation. Hence, it cannot be prepared in isolation, independent of the voir dire, order of witnesses, anticipated direct and cross examination of all witnesses, anticipated instructions on the law, anticipated evidentiary problems, and summation. The opening statement must mesh with the trial structure and blend into the trial strategy so that it becomes only a part of the trial concept. Thus, each portion of the opening statement must be compared to all other segments of the trial for consistency and support."[1]

Now I think it is pretty obvious why everybody has been saying that it is tough to study trials. It is difficult to abstract and isolate the various entities for purposes of study without destroying the effects of that which we are studying. That is why researchers are now calling for realistic trial stimuli for studying the various aspects of the trial process.

The Function of Opening Statements and Closing Arguments

Now I want to briefly review the information - flow theory of the trial process so that we can focus more on the functional aspects of opening statements and closing arguments. There are at least two levels of consideration when one contemplates trial functions! The formal or legal level, as traditionally stated in the language of the law; and second, the informal or more pragmatic level as actually operationalized by the participants in the process.

For example, consider the two levels of expectation concerning the over-all function of a trial. From a formal point of view, a trial is a conflict resolving process where we seek truth and justice. However, from a practical point of view, what is truth and justice? How do we operationalize these celebrated abstractions? It's really simple, believe it or not. In the final analysis, truth and justice is whatever a jury says it is! So, pragmatically, do attorneys really seek actual truth and justice or do they merely formulate a picture of their own perceptions of what truth and justice is and then do everything they can to "sell" the jury on their "version" of the truth? I think the answer is pretty obvious.

Now, let's focus more specifically on the "information flow" theory of the trial process. From a formal point of view, the flow of information in a trial is designed to follow a logical, rational, decision-making process which is carefully guarded by the rule-governed, closed nature of the system. First, in the opening statement, each attorney is allowed to explain his or her version of what the case is all about. Thus, over the years, the formal function of an opening statement is informative in nature. Attorneys are expected to give expository explanations of their cases, leaving out persuasive argument, as has already been indicated by Dr. Starr and Don Peters. In Florida, jurors are instructed as follows concerning the function of opening statements:

> "First the attorneys will have an opportunity to address you; that is, to make opening statements to you and to outline to you their contentions as to the essential facts in the case in accordance with the evidence which may be admitted during the trial for your consideration through the testimony of witnesses and by other means. What the attorneys say is not evidence, but is merely to enable you to understand and judge the evidence as it is presented to you."[2]

Richard T. Marshall, an attorney from Texas, aptly states the formal function of an opening statement as follows:

> "A good opening statement is designed to inform the jurors of the case, to explain what they can expect to see and hear at a trial, and to tell them what is expected of them."[3]

Thus, the first step in the rational "information flow" theory is to give the jurors a good grasp of what the case is about so that they can understand and follow the story line from beginning to end.

The second level of this information flow process is the evidentiary part of the trial when the facts are presented in the form of testimony and tangible evidence. This aspect of the trial has already been extensively discussed and may merely be mentioned here.

Finally, the attorneys in closing arguments are allowed to draw conclusions and extrapolate from the evidence their judgments of what actually happened. The court certainly recognizes that the evidentiary part of a trial may appear disjointed, confusing and even contradictory! In the closing arguments, from a rational point of view, the attorneys are given the opportunity to bring it all back together into a logical relationship, weaving the testimony, documents and other evidence into the cohesive story presented originally in opening statements.

Rules for closing arguments are much more relaxed and attorneys are clearly expected to be overtly persuasive. As Michael F. Colley observed:

> "Final argument is the time for feeling. It is the time for emotion."[4]

Now re-cap the formal function of the logical flow of information during a trial. First, the attorney describes what the case is all about so that the jury clearly understands both what happened and each sides version of how it reportedly happened. Secondly, the jury is given the facts upon which they can rationally and logically reach a decision. Then, each attorney is given an opportunity to persuade the jury with logical argument based upon the evidence. Finally, the jury, loaded with explanations, evidence and logical argument, retire to the jury room, after having been properly informed of the applicable law by the judge. There, in the solitude of the deliberation room, the jury, with calm deliberation, logically sifts through the evidence, applies the law, and finds the TRUTH, and true justice is served!

Formally, legally, that is the way the process is designed to work. It is a neat, logical package which satisfies our desires to be rational and to be guided by rules of law.

However, as I stated earlier, there is another functional level of consideration which must be taken into account. From a practical point of view a trial must be considered a dynamic (as opposed to static) rule-governed proceeding which permits considerable latitude for persuasion. Don Peters stated the premise very simply in his paper: "Legal Strategy for opening and closing is simply summarized: persuade him or her or them."

Let's face reality! The human element present in every trial frustrates even our most honorable attempts to be totally rational. I'm the first to admit that we try hard to eliminate bias, and certainly the law requires that we do eliminate bias. Yet, personal bias is present in every trial. For example, we tell jurors that they should eliminate everything they have read or heard about a case before the trial and specifically consider only the evidence presented during the trial. Yet, our own personal experiences tell us that jurors probably cannot truly accomplish that feat. Consider trial objections; an attorney asks a leading question and his opponent objects. The judge sustains the objection and admonishes the jury to disregard what they clearly heard. Most attorneys and judges agree that the damage has been done and jurors are not likely to easily forget, yet the rules remain and we continue to apply them as if jurors could rationally wipe the remarks from their memories.

Again, consider the function of the opening statement. Formally we say that the opening serves only an informative function and overt attempts at persuasion are not allowed because trials have been traditionally designed as rule-governed, closed systems where one is not supposed to be persuasive until the RULES permit. And the RULES say one can be persuasive only in closing arguments. Now that appears perfectly logical. However, to accept the above premise is to ignore clear reality. Communication theorists, for example, now accept the broad concept that being persuaded relates to three behavioral outcomes: Attitude formation, attitude reinforcement and attitude change.[5] What we call "informative communication" serves a persuasive function in that it conditions jurors to respond in a certain way. Attitude formation begins at the point where the jurors receive their first piece of information and intensifies as more information is supplied. Of course attitudes may be further modified during the course of the trial all the way from slight changes in opinion to complete opinion shifts.

Now, I have said all this in order to pin-point and emphasize something Dr. V. Hale Starr said in her paper. I want to quote her directly for emphasis:

> "Before any valid conclusion can be drawn concerning the importance of the opening statements as measured by its influence on the final verdict, more research must be conducted to determine how jurors process information in order to arrive at their decision (verdict). It would appear that special attention should be placed on determining the decision-making process that jurors follow, especially in evaluating how they interface their pre-trial judgments with the evidence or arguments they hear in trial."

In view of what I have previously said, I find myself in complete agreement with Dr. Starr on this issue. It will do us little good to try to conduct research on a ritualistic legal ideal which really is not functional. After all, realistically, the jurors with their verdict, determine what justice is to be in a given case. So, it stands to reason that we must focus our efforts, not so much on how legal purists want the system to work, but on how jurors actually go about processing information, both during the trial and during deliberation.

Now, let me retrace my steps long enough to admit that certainly formal trial procedures, as restraining factors, have some kind of influence on trial outcome; but probably not nearly as much as we may have previously assumed.

Where Do We Go From Here?

Since a great deal of time was spent in the three position papers concerning research, I feel compelled to make a few observations.

Research in communication has come a long way in the last fifteen years. At least part of this research has resulted in sound theory, although some is highly questionable. I am somewhat surprised at how reluctant we are to apply what we know about communication in general to the courtroom in particular. It's almost as if courtroom communication is considered a totally different species from all other forms of known communication. I can understand how we arrived at this conclusion. Most of us have been conditioned to stand in awe of the courtroom. It is almost as if we look upon trial events as a "holy ritual," so highly specialized that what we now know could not possibly apply. I think we forget that the same people who communicate at PTA, in our union halls, at political rallies, in our churches and in our classrooms, also serve on our juries. Do people go through some magic metamorphosis as they go through the doors of a courtroom to serve on juries? Is communication with a jury so vastly different from communication in other conflict resolution situations that we must "re-research" every concept in a trial context to make sure it applies? Are opening statements so unique that what we now know and teach doesn't apply? If immunization and commitment strategies work in union hall debate or legislative assemblies, why would we doubt their ability to work in the courtroom if similarly applied? If anchoring has proven to be beneficial through research and practice in our general experience, why would we assume there would be no specific applications to the courtroom? We need not be so timid!

If there is one thing I have learned in the past ten years it is that juries are just small groups and their behavior is similar to small group behavior in a variety of non-courtroom contexts. A speech in a courtroom, while operating under certain rules, is still a speech. Of course, the courtroom offers a highly specialized occasion for speech making, and that affects all participants, but fundamentally the process of communication is the same: A sender; a message; a channel; and receivers. There may be communication problems unique to the courtroom, but then there are communication problems unique to all particular circumstances. While it may be necessary to confirm some communication principles to the courtroom setting, I suspect that much of what we already know clearly applies.

However, let's face it there is so much that we don't know and the courtroom offers a challenging opportunity for research. One example is in the area of primacy - recency. Frankly, I thought that primacy-recency research was dead. I was never too excited about it, but then I can see a clear application to opening statement and closing arguments which is unique to the courtroom setting, especially when one considers the tripartite procedure which allows those who are considered to have the burden of proof to speak first in closing and have the opportunity for final rebuttal, thus giving them the advantage of both primacy and recency. This procedure takes on even more meaning in my own State of Florida in criminal trials. In Florida, a defense attorney in a criminal trial may, as a matter of strategy, decide not to offer any evidence in his client's behalf, other than his client's own testimony. If he follows this strategy, then he or she has the option of speaking first and last in summation. If, however, he offers even one additional piece of evidence, then it reverts back to the regular procedure where the prosecutor speaks first and last.

In a situation like this one we can clearly see why a criminal defense attorney would like to know more about primacy - recency impact. He or she actually has a choice as a matter of strategy. It would be interesting to find out if the risk of not presenting evidence, other than defendant's own testimony, would be off set by the advantage of having both primacy and recency in closing arguments.

I might add, by the way, that this somewhat unusual practice is not allowed in civil cases in Florida.

One of the previously delivered papers, in the final section, dealt with suggestions for research format. The author made a statement early in this section with which I'm not sure I fully concur. She commented that in trial research we should probably concentrate on civil cases, which deal with liability and damage issues because they offer a better opportunity for accurate evaluation. It is true, of course, that there is almost unlimited possibilities for comparisons of verdicts when one gets into damage issues. However, I would argue that criminal trials also provide for research opportunity and comparison of results beyond the mere guilty/not guilty verdict. Most serious criminal offenses contain lesser included offenses which gives a kind of Likert Scale for comparison purposes. For example, take the charge of DWI - manslaughter; in Florida that is a serious offense. However, there might be lesser included offenses available to the jury like, simple DWI or vehicular homicide. The jury, in the course of their decision may pick the highest offense which the evidence justifies or, of course, find the defendant not guilty. In this example, then, there would be four possible choices, ranging from the most serious offense to not guilty. Other criminal offenses may have even more lesser included offenses, which, of course, would give a broader scale for selection. In my view, criminal trials may offer advantages over civil trials in that they may have a greater capacity for maintaining interest.

The Video Tape Trial

The video tape mode for the presentation of a trial for purposes of research, as suggested by Dr. Starr, is, indeed, an attractive procedure. It has already been tried and tested and proven to be useful. Researchers at the University of Central Florida, under the auspices of an LEAA grant, produced a full-length, very realistic trial, which has been used repeatedly in research over the past eight years, both at the University of Central Florida and in other parts of the country.[6] The results have been both enlightening and satisfying. The versatility of the video tape mode is tremendous. One can easily edit stimuli in or out, as required by a given experiment. Researchers using this tape have experienced little difficulty in getting subjects to accept this mode of presentation as realistic.

Nevertheless, the method can be expensive, as we discovered. The video tape production MUST be professionally done. Second rate, defective presentations will lead to no good end. So when one commits himself or herself to video tape a trial, invest enough money to be able to use good production crews and build a realistic courtroom set. Get the cooperation of actual courtroom personnel, if possible. One can usually find judges, attorneys, baliffs and clerks willing to help. There are almost always student and faculty actors around to fill in the other parts.

Finally, one should write a production script of the entire trial. Don't try to work haphazardly! Know exactly what you are going to do and when you are going to do it. Base the script upon an actual case, if possible; that will make it even more realistic.

In the State of Florida, and in a few other states, television cameras are now allowed in the courtroom under certain conditions. This could provide a unique opportunity for the video taping of a trial under actual circumstances. However, video taping of an actual trial for purposes of research has not yet been tried, to my knowledge, and I am not sure if the court would ever permit it. Beyond that, I am not sure it would give us what we want anyway. It appears to me that a mock trial production offers much more versatility, yet far more control. I think we are going to have to wait and see what potential for research television in the courtroom provides us.

The Case Study

To this point we have spent a great deal of time talking about quantitative research in the courtroom setting. Yet, even as we talk all of us realize that the courtroom presents especially difficult challenges for controlled research. At best, in our experiments, we study simulations of the real thing and not the actual trial process.

I realize that among researchers the so-called "case study" method enjoys far less prestige than experimental research - and for good reason. However, circumstances sometimes dictate methods which, while not preferred, are really the only way we can accomplish the task. The case study, with all of its deficiencies and problems, brings us as close to the real life situation as one will ever get. Babbie observes the following about field studies:

> Field observation differs from some other models of observation in that it is not only a data-collecting activity. Frequently, perhaps typically, it is a theory-generating activity as well. As a field researcher you will seldom approach your task with precisely defined hypothesis to be tested. More typically, you will attempt to make sense out of an ongoing process that cannot be predicted in advance - making initial observations, developing tentative general conclusions that suggest particular types of further observations, making those observations and thereby revising your conclusions, and so forth. The alternation of induction and deduction. . . is perhaps nowhere more evident and essential than in good field research.[7]

This process of direct observation, data collection, searching for similarities and dissimilarities, is not only important as a "theory-generating activity," but can, over time, lead to some rather interesting conclusions. It has the advantage of flexibility, doesn't cost much, and it brings one into direct contact with that which is being studied in a real life situation. Obviously, it has weaknesses and limitations. Since it is qualitative rather than quantitative, we find difficulty in generalizing our findings to a large population. However, even that disadvantage can be somewhat off set over time if one observes enough cases. Of course, that suggests the second disadvantage - case studies take time and patience. A single trial can last several days - and one would probably need to observe several trials. Even when one has observed opening statements and closing arguments in several trials, interviewed judges, attorneys, observers, and even jurors if possible, he still faces the criticism that his sample is too informal and may not be representative of the total population.

Nevertheless, there is much to be learned from case studies. Everybody wants to jump right in and start with experimental research and far too few want to take the time to conduct field research to determine where we are, what we know, what the current practices are and formulate theory and hypotheses for future research efforts.[8] While there is more glamour attached to quantitative studies, perhaps at this stage in our courtroom communication research we need at least some emphasis on qualitative studies.

Conclusion

In the final analysis concerning opening statements and closing arguments, some research has been conducted, often of dubious value, and we need much more competent research; we know some things, but there is so much more to learn. Since the focus of every trial is communication, obviously communication scholars have the potential for making major contributions to better understanding and practice of the process. However, if we are to meet the challenge, we are going to have to tighten our research efforts and be more innovative in our search for understanding of the trial process and how it really works.

FOOTNOTES

Raymond W. Buchanan, Ph.D., Professor and Chairman of the Department of Communication, University of Central Florida, Orlando, Florida 32816.

[1] William A. Trine, "Motivating Jurors Through Opening Statements," Trial, December, 1982, p. 83.

[2] Florida Standard Jury Instructions In Criminal Cases, Second Edition, 1.01, "Opening Statements," p. 3.

[3] Richard T. Marshall, "The Telling Opening Statement," The Practical Lawyer, Vol. 19, No. 6, 1973, p. 28.

[4] Michael F. Colley, Trial, August, 1981, p. 46.

[5] For a more extensive explanation see: Michael E. Roloff and Gerald R. Miller, eds., Persuasion: New Directions in Theory and Research, SAGE Publications, Beverly Hills, 1980, pp. 16-22.

[6] K. Phillip Taylor, Raymond W. Buchanan, Bert Pryor and David Strawn, "How Do Jurors Reach a Verdict?" Journal of Communication, Spring, 1981, Vol. 31, No. 2, pp. 37-42.

Amiram Elwork, James J. Alfini, and Bruce D. Sales, "Toward Understandable Jury Instructions," Judicature, Vol. 65, Nos. 8-9, March-April, 1982, pp. 432-433.

[7] Earl R. Babbie, The Practice of Social Research, (Belman, California: Wadsworth Publishing Co., Second Edition, 1979) pp. 205-206.

[8] For an example of a field study in a courtroom setting see: K. Phillip Taylor, Raymond W. Buchanan, Bert Pryor and David U. Strawn, "Avoiding the Legal Tower of Babel: A Case Study of Innovative Jury Instructions," The Judge's Journal, Summer, 1980, Vol. 19, No. 3, American Bar Association, pp. 10-15.

RESPONSES TO OPENING STATEMENTS AND CLOSING ARGUMENTS PROGRAM

E. Neal Claussen: It was brought out today that there is a difference between trying a case before a judge and a jury. Have you found in the review of the research any studies that really try to get at that kind of a difference in a trial?

John France: We found no studies at all that talked about judges. All of the studies deal with juries or mock juries.

William Benoit: It is easy to do mock jury research because you can get students to do it. The only way you can test judges is to get real judges because presumably it is their experience and training that makes a difference. We do need studies with judges, to be sure.

Roger Haydock: We, as clinicians, use role models to teach communication skills. Yet, we find in presenting a videotape presentation of a skilled, experienced trial lawyer to a panel of jurors, a surprising number of them say that the attorney who is too slick is not as persuasive as the attorney who fumbles, loses notes, can't remember names, etc. The latter model seems human and we can trust that person better than the person who is too slick. So, we have to ask ourselves as clinicians, "Are we training people in the wrong way? Are we training them to be too slick so they are not going to be as persuasive as those people, who, without any training, might be more persuasive?" Is there any research out there which addresses this situation?

V. Hale Starr: We work with attorneys who are too slick and we work at ways to "unslick" them. We have one attorney who is so handsome, six feet, four inches tall, a very pretty picture. He is brilliant; he never forgets a name. We couldn't "unslick" him because he is nearly perfect. But, half way through the opening statement you notice that his cuff link falls out and, in its place for the rest of the day, he wears a paper clip. From then on, it seems to make him human. I hate to use tricks, but he does well at this.

Leroy Tornquist: I find something disturbing about that whole thing. There is a lawyer in Chicago who used to do things to make sure the jury didn't know he was a wealthy lawyer. He would break his glasses and tape them. He used to have a brown bag sitting on the table so they would think it was a brown bag lunch. In my opinion, those are the kinds of things that lead to the mistrust of lawyers. When you talk about sincerity, you said some things that were inconsistent. You said sincerity is very important and I agree one hundred percent. Then you said a good trial lawyer is one who engages in a lot of tricks and does a lot of imaginative things. I think as soon as they identify a trick, the jury loses faith in everything that lawyer says.

John France: My experience in general is that you don't have to worry about lawyers being too slick. I have been in a national level practice and feel confident making that statement. Usually, they go in the other direction.

Gordon Zimmerman: There is a middle ground which those of us who teach public speaking encourage and that is simply a good conversational, fluid, straight-forward approach. I think we train people to do that all the time. In some of my training in the National Institute of Trial Advocacy, I tell the person giving the opening statement to get ready because, in two or three minutes, I'm going to interrupt and ask him a question he will be able to answer and I'd like him to continue on answering that question. Then, in two or three minutes I say, "Just a minute, can you tell me something about the car you drive and what you think about it?" You then have recorded on tape the changed expression of this slick, well-rehearsed presentation. Then you can say, "Do you see that change? That is how we are trying to get you to communicate with the jury." I don't think you have to be slick and contrived. Nor do you have to be bumbler. You can achieve a middle ground to be most effective.

Raymond Buchanan: Whoever sets out to try and trick anyone on the basis of being something they are not are running a big risk. They might get by, but I think they are running a risk. I just don't adhere to a policy of advising an attorney to be someone he really is not. Basically, you have got to go in there and be what you are and be as honest and sincere as you can be. If you have inadequacies, so what? We all have inadequacies. I think the more common sense approach is to be what you are and most people will accept that.

Warren Wright: I would suggest that when we hold this conference again, and I assume we will hold it again, that one of the central questions we might address clearly from the previous discussion is the ethics of lawyering.

Gordon Zimmerman: I would like to support Jack Etheridge's notion that, if social scientists talked to judges, they could get a lot of things done. One of my colleagues wanted to videotape a complete trial to use in his legal argumentation class. He talked to a judge to get a tape of a highly visible trial in Reno. He marshalled all his arguments for the judge regarding how he would like to videotape the trial. As the judge started through his arguments, he said, "I'm kind of busy. What is it you want?" My colleague tossed out all his arguments and said, "I want to videotape a trial from beginning to end." The judge said, "Fine." That was the end of the conversation. You'd be surprised how cooperative judges can be concerning our research proposals.

Robert Nofsinger: I would like to make an observation regarding whether or not a lawyer should be him or herself and what effect that has on the jury. I think it is a mistaken assumption to believe that each of us has just one self, that there is a real "us", and that we behave the same under all circumstances. We are all multi-style communicators and it seems to me that the style that we feel comfortable with in certain circumstances is what we see ourselves to be under those circumstances. I think the thing to do is train the lawyer to be comfortable with different communication styles in the situation of the courtroom and yet styles that the jury would be comfortable with. Once the lawyer becomes comfortable with certain styles, they become the lawyer's real self for the purpose of each particular situation.

V. Hale Starr: When we get involved in ordering evidence, we are perfectly willing to feel that it is ethical. We're perfectly willing to look at language and word choice and manipulate it in order to have certain image bearing techniques on the jury or judge. We are willing to manipulate language, not change the facts, but develop the way language creates reality. Then we start looking at nonverbal communication, and whenever we do anything nonverbally it immediately becomes insincere manipulation that is distrusted because it isn't a true display of the self. Those of us involved in communication are involved in the total communication process. Verbal and nonverbal factors work together to contradict or to cooperate in a display of a message. I plead with you to evaluate techniques that are nonverbal and that you don't do it from a viewpoint of distrust.

Leroy Tornquist: Good advocacy and sincerity require that we clean up communication, to work on communication style. I have a problem though whenever you use nonverbal techniques to affirmatively mislead. That would be a real travesty. I am all for the improvement of communication skills, but not to affirmatively mislead.

Michael Altman: A couple of years ago I saw a re-creation of a trial involving the crash of an airplane. The way they reconstructed this case was to have the air controller talking to someone else who had a contrary view of what occurred. The air controller said, "I did this" and the other person said, "You didn't quite do that." There was no intermediary asking questions. We've assumed the existing trial model gets at truth. Is that really the best model? Does the present model have to exist to the exclusion of other options that might be more effective?

Raymond Buchanan: Your question raises interesting possibilities. For example, I have often posed the question, "Why shouldn't we let jurors ask questions?" If there is something in their mind they don't understand, why shouldn't they have an opportunity to address questions? Lawyers usually bounce off the wall in all kinds of directions when you raise that question. They can think of 10,000 reasons why that shouldn't be done. But, when a juror has a question and it goes unanswered, there is a good possibility they will supply their own answer anyway. Unanswered questions potentially pose serious problems. We have this model which does not allow jurors the opportunity to give and get feedback. Why?

V. Hale Starr: There are states where jurors can ask questions. If you are interested in that, you could compare the states where questions are allowed and the types of questions jurors ask. There are states where you can send the question to the judge and the judge determines whether or not that question can be asked of the witness or lawyer.

Jack Etheridge: There is an area we overlook because it is small in size. That is the small claims court which is moving toward a more inquisitorial approach. In some cities on a given day they put all the laundry and cleaning cases or all the automobile repair cases on the docket. It is a good technique which is being used more and more and that is something that could be researched.

V. Hale Starr: Another resource area we ought to remember is court reporters. They have societies in every state; they are in court every single day; they work with a variety of judges. If you need resources, you could probably contact court reporters to volunteer to send you every question that went by the judge or by the jury. Court reporters can help you out in many ways.

William Benoit: That is true. I've called court reporters and they have offered to give me transcripts of trials that had been appealed. I offered to pay them for the transcripts and they said, "No." Their information is stored for three to five years and they are very cooperative when asked to help.

Jack Etheridge: There is a point that Ray Buchanan made very well and so did Hale Starr about the possibilities of verdicts. There is one we haven't mentioned and I think it is very important not to forget it. That is the jury's ultimate power which is always brewing in every case of nullification, the power of forgiveness. We forget about that lots of times, particularly in criminal cases. The jury can simply decide when enough is enough. I think it is important because whenever you argue your case, particularly a bad case, you want to get that idea to the jury as something not to forget. I make the point because it is important and because it gives me a chance to tell you a humorous story.

Ray Buchanan and I are just country fellows from South Georgia. Where we come from is a place where you have farms on sandy soil. On day, old Roosevelt Jones is getting ready for spring and he needed a garden. Unfortunately, his mule had died and he just couldn't make his garden. His landlord was a mean fellow that lived up the road. He has a barn and he had a mule. One night the landlord discovered the mule was gone. He found the tracks on that sandy soil and went down there. Sure enough, Roosevelt had plowed and planted his garden so he could feed his children. The evidence was circumstantial, but it was strong. The case went to a jury because the landlord wanted prosecution. And the jury found the evidence was strong. The judge asked the jury to come in and make a verdict. They did come in. And the judge said, "Gentlemen of the jury, have you reached a verdict?" The foreman of the jury, like the rest of the jurors, liked Roosevelt Jones very much and said, "Yes, your Honor, we have." "What's your verdict?" "Well, we the jury find Roosevelt Jones not guilty, providing he return that mule!" (Laughter) The judge was curious about that and said, "I don't follow that. Go back and make the proper verdict." The sheriff sent them back. The judge waited, stormed and fumed and finally he called back the jury. He said, "Now, have you made a verdict?" And the foreman said, "Yes, your Honor, we have." "Well, what's your verdict?" "Judge, we the jury find the defendant, Roosevelt Jones, not guilty and he can keep that mule!" (Lots of laughter)

CONCLUDING REMARKS

Conference Speaker

Gerald R. Miller
Department of Communication
Michigan State University

ON THE MEETING OF EPISTEMOLOGICAL AND METHODOLOGICAL MINDS: SOME FINAL THOUGHTS ON THE CONFERENCE

Gerald R. Miller

There are several ritualistic and non-ritualistic obligations I should get out of the way first. Let me join the numerous other participants who have thanked both Ron Matlon and Dick Crawford for their work in organizing the conference. I think we might also again thank the graduate students for their numerous survival runs, transportation to the airport, equipment management, and a host of other things. I think they have been a tremendous asset in moving the conference along.

The second obligation that I want to get out of the way relates to the general experience I have had at conferences of this sort. It strikes me that there are differences in sartorial splendor between academics and attorneys. We had a very early reference to that during Jim Weaver's address and ever since then we have come back to it again and again. In providing continuity I suppose I ought to say that I put on a suit today to visit with you so that I might be mistaken for a lawyer. Actually, that is not my real reason. I had nothing else to wear today and that is why I decided to put on a coat and tie for these last few minutes.

Finally, let me say very quickly as the last and third obligatory statement, I do not have any books at all to peddle to you today neither at their original price nor at post-Christmas reduction sales. I do have a mound of old reprints that I would be glad to sell you at reduced prices, however. If you are interested, you can see me after the talk this afternoon.

I do have, however, a very formidable assignment. Dick and Ron contacted me several months ago and they sort of put it like this. "Now what we need is someone to come out and sit around and listen and participate and read the papers and hear the discussions and then at the end of all this try to say something sort of meaningful and synthetic to bring things to a close. Would you like to do that?" I said, "Well, that sounds like a very formidable assignment, but I suppose I could give it a try." They said, "Good and we would like to have the paper about a week before the conference, if possible!" Given that kind of dilemma and having heard all of the very insightful, creative and rigorous thoughts that have been expressed both in the papers and in the discussions, I started becoming very apprehensive about my assignment today. It struck me that perhaps I might be able to make my famous Jascha Heifetz exit. A number of years ago, Heifetz, the world renowned concert violinist, had scheduled one concert in Detroit and had booked a later concert in Chicago. He happened to have a day, an interim day, with nothing scheduled. So, to fill in the time he booked a concert in East Lansing. Unfortunately, it was during the winter months. On the day before the scheduled concert, we had one of the worst blizzards that had occurred in Michigan in the last decade. So, when Heifetz walked out on the concert stage, he looked out over the audience and there were only about a half dozen people. Naturally, he was outraged and indignant. He announced, "I am sorry. I cannot perform for an audience of this size. The concert is cancelled. Your money will be refunded at the box office." Whereupon some fellow in the rear of the auditorium jumped up and said, "Now just a minute, Mr. Heifetz. My wife and I drove two hundred miles through ice and snow packed roads. We took our lives into our hands to come here and hear you perform and now you say you are not going to perform. Couldn't you sing at least one song for us?" (Laughter)

Mercifully, I will not sing songs. I will attempt, however, to try to capture some thoughts that I have had about the conference, part of which I will read from the semi-completed manuscript, and then I will ingeniously and creatively interweave extemporaneous observations with the ongoing manuscript. That is a rhetorical ploy for warning you that the remarks will be poorly organized. Within that context, I will try to capture some things, although I obviously cannot capture the whole spirit and substance of what has happened here.

The past three days, captured in the papers presented and the ideas exchanged, have yielded a rich conceptual, theoretical, empirical and experiential harvest. Now I am required to separate the scholarly and practical wheat from the chaff in a few concluding comments. The assignment, while challenging and intriguing, is formidable. To borrow from the name of the conference site's location, it is a task befitting an oracle rather than a fallible, imperfect human like myself.

Surely this is no time for nitpicking. During our time together, scores of issues have emerged. Reasonable women and men can disagree, and have disagreed, about the practical alternatives, judicial and scientific values, and research priorities expressed by the conferees. What is needed indeed, what your weary bodies and digestive systems demand--are a few bold strokes of synthesis, not detailed summary and analysis. Which strokes are most appropriate; which capture the complex hybrid of heady opportunities and thorny problems revealed by this conference?

While mulling this question over during the past weeks, I have repeatedly returned to an analogy, or metaphor, drawn from another of my areas of professional interest, interpersonal communication. Though I deem it unlikely, my preoccupation with analogy may result from the convincing endorsement of its rhetorical effectiveness offered by Don Peters at this conference. What is more probable is that the cooperative efforts of scholars and practitioners of the law lend themselves easily to the analogy of interpersonal relationship. In a paper appearing six years ago, Franklin Boster and I used a courtship metaphor to the increasing contacts between social scientists and legal professionals, stating:

> Legal professionals and social scientists have only recently begun a persistent, if somewhat hesitant, intellectual courtship. To be sure, history has witnessed occasional attempts by one suitor to woo the affections of the other, but these infrequent advances have resembled shotgun weddings more closely than mutually compatible professional marriages. Events of the last few decades, however, have strengthened the vows of both parties, and future annulment or divorce grows increasingly unlikely.[1]

Six years later, I am struck by the thought that this courtship metaphor fails to capture the relational status manifested in the pages of our journals, the courtrooms and classrooms where we ply our trades; and, for that matter, the activities pursued at this conference. Despite several decades of intermittent cooperative undertakings, it appears to me that students of communication, whether primarily researchers or teachers, and students of the law, whether primarily scholars or practicing professionals, are still haltingly testing the beginning relational steps of acquaintanceship. What cautious prognosis can be offered as to the likelihood that this acquaintanceship will blossom into closer, more intimate intellectual and professional bonds? I wish to focus on this question in my remarks today, using examples from the papers and discussion of the past three days as at least partial redemptions for the claims I will make.

Unquestionably, some features of this budding acquaintanceship provide cause for concern as to the probability of its bursting into full flower. Social psychologists such as Don Byrne[2] and Milton Rokeach[3] have gone to considerable pains to document the importance of attitudinal and belief similarity as determinants of relational attraction and satisfaction. Upon considering the differing interests and priorities of the communication researcher, the teacher of communication, the legal scholar, and the practicing legal professional; certain disparities in attitudes and beliefs are quickly apparent. What are some of these key dissimilarities; what do they portend for the chances of relational growth and development; and how can they best be accommodated in order to maximize the probability of a flourishing relationship? Let me turn to these questions.

A potentially divisive dissimilarity between communication researchers and many legal scholars and professionals lies in their differing epistemological postures, i.e., in their varying attitudes concerning the grounds used to establish knowledge claims. As several philosophers of science such as Reichenbach[4] have noted, the birth of scientific thought signalled a marked departure from the prevailing epistemological state-of-affairs because knowledge claims came to be conceived of as being, in principle, authority-free. Before the ascendancy of science, knowledge claims were typically linked with authority; stated differently, the acceptability of a knowledge claim relied heavily on the credibility of the person making it. Indeed, both the epistemology and the metaphysics of that early giant of the rationalist school of philosophy, Plato, were inextricably bound to an authority-centered view of knowledge. The philosopher-king; by virtue of superior intellect, intensive training, and finely-tuned intuition; became the final arbiter of knowledge claims charged with the vital task of interpreting "truth" and "reality" for the unwashed masses.

Contrast the preceding epistemological stance with its most stark scientific antithesis, the verifiability criterion of logical positivism. This criterion holds that knowing is essentially synonymous with knowing how to verify. Furthermore, since accepted procedures for verification are public and universally "knowable"--i.e., available to any normally intelligent and sensible person--knowledge claims are authority-free. Their acceptability hinges on the soundness of the procedures used to verify them, rather than the authority of those parenting the claims.

Now that is the epistemological distinction I am drawing and perhaps the best way I can illustrate that is with a personal experience that happened to me at the end of our research dealing with videotape and courtroom trials[5]. We spent four or five years on it and worried a lot about appropriate verification procedures. One of our most avid supporters was Judge James McCrystal from the Erie County Court of Common Pleas in Sandusky, Ohio. Some of you may know that Judge McCrystal has traditionally been the strongest advocate of the pre-recorded videotape trial. At the end of four years of research, Jim McCrystal came to me and he said, "Gerry, that's the best damn research I have ever seen." I said, "Well, I don't think it's bad, but I think you're being a little extreme. Why do you say that?" He said, "Well, it just demonstrates everything that I knew!" (Basically we had found that in terms of juror response there were no deleterious effects to using videotaped material.) So, I said, "That's very interesting, Judge. What would you have done if it would have come out a little bit differently and we would have seen that there were some problems here and there with the videotape." He said, "If that would have happened, I would have known the research was wrong."

Now I tell you that story not to criticize or to compare one position or the other, but just to say clearly that here is a person subscribing to the sort of rationalist view I have described. His own experience and personal authority with videotape for him provided the strongest basis for making knowledge claims about its acceptability and effectiveness. That is the kind of contrast that I am trying to draw between the two epistemological stances.

However, lest I am misunderstood, I hasten to add that I am not conjuring an image of an Oracle Conference Center inhabited by warring societies of communication scientists and legal experts, a sort of professional and intellectual blood-bath perpetrated by autocratic Platonists and narrow-minded logical positivists. Save for a few diehards, the current episteme of the social sciences has renounced the rigid anti-mentalism of the positivists. Similarly, the impact of empirically-moored science has been so socially pervasive that most legal experts would agree to the value of at least some intersubjectively reliable sense data as a guide to practice and policy. To grant this move toward moderation, however, in no way denies the continued existence of a preference for one kind of evidence over the other. Several papers presented by conferees contain explicit or implicit knowledge claims that rely heavily on the personal experience and authority of the author, or on the claims of some other legal communication authority--in fact, this epistemological stance has been described by conferees with phrases ranging from "How to..." to "celebration, observation, conclusion." Hegland's paper, and to a lesser extent Peters', are two cases in point. By contrast, the papers of Taylor and Wright and of Benoit and France hew closely to the findings of social science research; indeed, both pairs of authors studiously eschew claims not grounded "in the data." Among epistemological ecuminists (and parenthetically, I suspect that all of the conferees qualify for this title), these differing evidential bases need cause no serious problems. But when one contemplates the wider populations of communication researchers and teachers and legal scholars and professionals, a substantial cadre of dogmatic fundamentalists can be readily identified. Each of us is acquainted with individuals who wear their fundamentalist badges proudly and defiantly. Among communication researchers, their creed is characterized by an unswerving dismissal of any claim rooted in personal authority as mere "prescriptive opinion;" among legal scholars and professionals, fundamentalist doctrine renounces the findings of social scientists as poor and imperfect substitutes for the experiences of legal authorities. When pursued vigorously, such dogma is sure to place severe strains on the cooperative acquaintanceship forged by the two groups.

A second related dissimilarity concerns the relative priority attached to the internal versus the external validity of research findings. On numerous occasions during the conference, conferees have raised questions regarding the extent to which findings of carefully controlled laboratory studies can be generalized to actual legal situations. Such queries reveal a preoccupation with external validity, i.e., a commitment to making research findings incontrovertibly applicable to real-world legal communication settings.

By contrast, a number of comments have focused on the difficulties associated with interpreting the causal antecedents leading to particular outcomes in studies conducted in less structured, uncontrolled natural settings. Such comments underscore a preoccupation with internal validity, i.e., the ability of the researcher to isolate, with minimum ambiguity, the independent variables actually contributing to specific research outcomes.

Perhaps these differing priorities can best be illustrated by contrasting the approaches to a hypothetical research problem that might be taken by highly committed adherents to each of the two types of validity. Assume one were interested in determining whether attorneys might be better advised to avoid raising objections to inadmissible material presented by opposing counsel, rather than verbally challenging its introduction. The reasoning underlying such a possibility can be summarized as follows: To offer an objection calls the jury's attention to the potentially inadmissible material; that is to say, the communicative exchanges between attorneys and the judge which occur makes the inadmissible material more salient to jurors. Because of this heightened salience, such material, even if ruled inadmissible by the judge, may assume more cognitive prominence to jurors than if the offended party's attorney simply ignores the material.

If asked to explore this possibility, a researcher with a bias for internal validity would immediately focus on a single key question: How can I conduct my research so as to maximize the likelihood that any differences observed can be attributed to the strategy used in dealing with the inadmissible material,rather than other potentially relevant variables? This question, in turn, typically predisposes the researcher toward a carefully controlled laboratory study. Such studies place a premium on careful design with appropriate control groups, appropriate range and typical types of stimulus materials, precise measurement of dependent variables, and concern with defensible sampling procedures. If our proponent of internal validity does her or his homework carefully, any results observed should be interpretable in terms of the independent variable of interest, the strategy used in dealing with inadmissible material.

While perhaps granting the ingenuity of this well-executed research, the individual with a bias for external validity may hasten to question the study's ecological validity. Stated differently, he or she may point out that while the study yields an unambiguous explanation of the outcomes observed in the laboratory, its generalizability to actual courtrooms is suspect. Better to undertake less structured observations in actual trial surroundings, e.g., to examine verdicts in a number of actual trials where attorneys elected to ignore inadmissible input by opposing counsel and to compare the results with comparable trials where objections were lodged. Immediately, however, the champion of internal validity will point out the problems inherent in attributing differences in outcomes to the strategy of dealing with inadmissible materials, rather than a host of other potentially relevant variables. And so the controversy rages.

The two attitudinal dissimilarities discussed thus far produce the four orientations summarized in Table 1. Permit me to offer the audacious hypothesis that each of us harbors a preference for one of these four orientations displayed in the two by two matrix. The *rationalist purist* is attracted to personal experience and authority as a basis for knowledge claims. In addition, she or he manifests considerable concern for the internal consistency and causal efficacy of any set of propositions derived from experience and authority. This is the kind of person you see fiddling around with some conceptual scheme or some set of propositions, worrying about whether they are internally consistent and clear. Then you say, "Hey, are you going to test those empirically?" The reply is: "No, why should I? It's right; I've got it figured out."

By contrast, the *rationalist pragmatist* frets about the way things work in actual legal settings, regardless of the precise reasons why, and assumes that personal experience and authority constitute the best source of information about such real-world workings. She or he has a greater concern for external validity. For instance, the rationalist pragmatist might be predisposed toward looking toward well known judges and attorneys. We asked Mr. Foreman the other night what he has found to be effective for doing this or that in the courtroom. If he is perceived as a credible authority by the rationalist pragmatist asking that question, Foreman's advice is well taken. If you said, "Why do you suppose that works for Mr. Foreman?", the rationalist pragmatist might say, "I am not exactly sure why it works, but he testified that it does work in the courtroom, and that's good enough for me. I'm going to give it a try." The difference is not in terms of the basis for the knowledge claim, but the relative emphasis placed on the internal versus the external validity of the system.

The empiricist purist opts for intersubjective reliability as the best grounds for knowledge claims; furthermore, he or she professes an affinity for theoretical elegance and causal clarity. This person is the traditional, stereotyped, theoretically oriented social scientist who spends a great deal of time working out a set of theoretical propositions or a coherent theoretical rationale, and then goes out to gather data to test the validity of those propositions or rationale. He or she is very concerned about designing tightly controlled studies so that causal factors and explanatory principles can be unambiguously tested.

Finally, while placing primary stock in intersubjectively reliable knowledge claims, the empiricist pragmatist is willing to suffer some measure of inelegance and causal ambiguity in return for a reasonably high level of confidence in the ecological validity of knowledge claims. The empiricist pragmatist is a little looser about the internal system and may just go out and ask people to look around the trial setting, reach some conclusions and draw some inferences from it.

I am arguing, then, that these are the four types or orientations that form the basis for knowledge claims and primary validity concerns. Maybe I could illustrate at least one dimension of that with a little story about two behaviorists and a cognitive psychologist. Apparently they were sitting at lunch one day. They got in an argument about what was the world's greatest invention. The first behaviorist said, "No doubt the radio is the world's greatest invention. With the radio you can catch sound beams from all over this planet, you can catch even the astronauts out there, you can have those signals transmitted and you can interpret and hear them from clear in outer space. The radio has to be the greatest invention of all time." The second behaviorist said, "I think the radio was a good invention, but for my money, I've got to come down for the television. With the television you not only can hear what the person is saying, but you can see that person or persons. I can sit right here in New York City, turn on the tube at 11:30 at night and pick up Johnny Carson out there in Los Angeles and not only hear what he is saying but see Johnny, Ed and all the people. The television has got to be the world's greatest invention." The cognitive psychologist thought for a minute and said, "I think the television is a great invention. I think the radio is a fine invention. But, for my money, the world's greatest invention has to be the thermos bottle." The two behaviorists looked at him and said, "The thermos bottle? That's absurd. Why in the world would you say that the thermos bottle is the world's greatest invention?" The cognitive psychologist said, "Look at it this way. The thermos bottle keeps the hot things hot and the cold things cold." The behaviorists thought for a minute and then they said, "What's so great about that?" And the cognitive psychologist said, "But how does it know?" What we might say that we have going in that little anecdote is a basic schism in the epistemological stance between the behaviorists and the cognitive psychologist about the primary basis for knowledge claims.

At first glance, the existence of such divergent epistemological and methodological views seems to bode ill for the blossoming of initial acquaintanceship into a more intimate, long term association. Fortunately, I do not think this is the case; indeed, having offered my audacious hypothesis, permit me to crawfish a bit by modifying it. Although I believe each of us probably harbors some degree of preference for one of the four orientations, I sense there are fewer pure types than in years past. By "pure types" I mean simply individuals who slavishly embrace but one of the four orientations and at the same time totally renounce the value of the other three. Had this conference been held a decade ago, I believe there would have been a great deal more controversy about the "correct" way to carry out research and to generate knowledge claims, precisely because there would have been more pure types who had pledged sovereign allegiance to one of the four orientations.

Instead, what I have sensed at this conference is a healthy move toward epistemological and methodological pluralism. Several signals of this trend merit comment. Epistemologically, it is encouraging to see some beginning steps toward cross-validation of knowledge claims grounded in the competing epistemological positions. For example, the paper by Loftus and Goodman takes a set of claims concerning direct and cross examination derived from personal experience and authority and validates them using intersubjectively reliable data obtained from psychological research. To be sure, Loftus and Goodman's approach assumes the hegemony of the latter epistemological stance since it becomes the yardstick for assessing the validity of the knowledge claims. But nothing prevents a reciprocal view of the process; it would also be possible to pass judgment on the validity of propositions based on intersubjectively reliable data by comparing them with advice grounded in personal experience and authority. Perhaps James Weaver set the epistemological tone for the conference in his initial remarks; when, speaking of some conclusions gleaned from observation of legal interviewing and counseling, he proclaimed, "It may not be behavioral science but it's behavior." It was clear that a pluralistic stance is emerging among advocates of the various orientations when Ruth McGaffey was able to assert, "You can learn a lot about something by talking with people who are good at it" without driving several empiricist purists from the room in a snit. And Jack Etheridge captured the emerging cooperative epistemological spirit when he offered the following advice to social scientists intent on communicating research results to legal professionals: "Don't spend 25 minutes telling about methodology. Tell them what you found and they'll accept you as an authority."

Methodologically, there has been little or no petty bickering about the relative merits of internal versus external validity. Quite the contrary, we have heard communication researchers pleading for studies in more realistic settings and attorneys asking for research that permits greater clarity of causal interpretation. In fact, it seems safe to say that all parties, regardless of orientation, have come to understand that social science research which is devoid of social significance is, by definition, trivial. What a refreshing change for an Old Buffalo like myself who began his research career at a time when it was fairly common for social scientists to disclaim any interest in the potential social applicability of their findings.

Indeed, when it comes to questions regarding internal versus external validity, conferees have demonstrated their awareness that a bit of methodological schizophrenia is a good thing. There is no inherent contradiction between careful research control and ecological validity. Studies that unambiguously isolate and identify causal antecedents can, given care and ingenuity, be carried out in realistic legal settings. The use of complete trial simulations, the employment of shadow juries, and the cooperation of interested parties in the legal sector are but three aids to more confident generalization. Conference participants have spent a fair amount of time discussing ways of designing research that satisfies the twin goals of internal and external validity.

Granted, many thorny problems must be solved if our understanding of the role of communication in the practice of lawyering is to expand dramatically. The papers and discussions of the past three days detail these problems effectively, and it is unnecessary for me to review them again. But despite the many obstacles, we appear to be on our way to resolving, or at least accommodating, the attitudinal differences that pose the greatest threat to a continuing harmonious and increasingly interdependent relationship. Moreover, I think the mere fact that persons of our varying orientations are meeting, talking, and planning augurs well for the health of the relationship. Recently, Michael Sunnafrank and I reported a study demonstrating that the initial negative effects of attitudinal dissimilarity could be overridden by ten minutes of introductory conversation.[6] This finding led us to conclude that attitude dissimilarity may often be an ephemeral phenomenon when an opportunity exists for communication. Surely, we have capitalized on that opportunity at Oracle, and if ten minutes can largely dissipate the impact of attitude dissimilarity, think what three days may have accomplished.

So my prognosis for a continued and more intimate professional and intellectual relationship is favorable. Let me close by underscoring my hope that the relationship will not be an indolent one. The conferees have had no difficulty identifying a host of intriguing and potentially valuable research undertakings. Given this inventory, it is time to stop talking about needed research and to start doing it. I anticipate future conferences dedicated to this objective. Finally, if we are fortunate enough to meet here at Oracle a decade hence, may our time together include some scholarly self-congratulation as well as some stocktaking about the future. I leave you with that beguiling, rewarding vision.

Table 1. Four Orientations Toward Research in Legal Communication

		Primary Validity Concern	
		Internal	External
Basis for Knowledge Claim	Personal Experience and Authority	Rationalist Purist	Rationalist Pragmatist
	Intersubjective Reliability	Empiricist Purist	Empiricist Pragmatist

Notes

Gerald R. Miller is a Professor of Communication at Michigan State University.

[1] G.R. Miller and F.J. Boster, "Three Images of the Trial: Their Implications for Psychological Research," in B.D. Sales (Ed.), Psychology in the Legal Process (Jamaica, NY: Spectrum, 1977), 19.

[2] D. Byrne, "Attitudes and Attraction," in L. Berkowitz (Ed.), Advances in Experimental Social Psychology, Vol. 4 (New York: Academic Press, 1969), 35-89; D. Byrne, The Attraction Paradigm (New York: Academic Press, 1971).

[3] M. Rokeach, The Open and Closed Mind (New York: Basic Books, 1960).

[4] H. Reichenbach, The Rise of Scientific Philosophy (Berkeley: University of California Press, 1951).

[5] G.R. Miller and N.E. Fontes, Real Versus Reel: What's the Verdict? The Effects of Videotaped Court Materials on Juror Response (East Lansing: Michigan State University report).

[6] M.J. Sunnafrank and G.R. Miller, "The Role of Initial Conversations in Determining Attraction to Similar and Dissimilar Strangers," Human Communication Research (1981), 16-25.

ABOUT THE AUTHORS

WILLIAM L. BENOIT (Ph.D., Wayne State University, 1979) is an Assistant Professor of Speech Communication at Bowling Green State University. He writes on legal argument and rhetorical theory and criticism.

RAYMOND W. BUCHANAN (Ph.D., Louisiana State University, 1970) is currently Professor of Communication ahd Chairman of the Department of Communication at the University of Central Florida, Orlando. Buchanan was the principal investigator in an LEAA grant in Florida titled "Improving Instructions to Juries." The study has had a significant impact on the drafting of Florida's criminal jury instructions. He has also participated in studies concerning cameras in the courtroom, jury deliberation behavior, nonverbal communication and jury selection.

RICHARD J. CRAWFORD is a Professor of Speech Communication at the University of Northern Colorado and holds three degrees in communication, B.A. and M.A. from Southern Illinois University and a Ph.D. from the University of Oklahoma. He is a frequent advocacy author, a national lecturer to trial associations and serves regularly as a jury trial consultant.

VIVIAN I. DICKS is an Associate Professor and Chairman of the Communication Studies Department at the University of Detroit. She received her B.A. from Wayne State University, her M.A. and Ph.D. from Ohio State University and her J.D. from the Detroit College of Law.

JACK ETHERIDGE (Davidson College, B.S., 1949; Emory Law School, J.D., 1955) is a Senior Judge in Georgia and Professor at the Emory University Law School. He also serves as faculty on the National Judicial College and is a fellow at the International Academy of Trial Judges and Harvard Law School. Etheridge has been Board Chairman at the Atlanta Neighborhood Justice Center and Chairman of the National Conference of State Trial Judges.

ROBERT J. FELDHAKE received has B.A. at Augustana College in Illinois and his J.D. from DePaul University. He is a Phi Beta Kappan and Moot Court champion. He is currently counsel for the law firm of Lord, Bissell and Brook in Los Angeles.

PERCY FOREMAN was born in 1902 in East Texas and by the time he was 17 he was a national lecturer on the Chautauqua Circuit. His communication skills were later used in the courtroom where he became a legend in his own time and has been referred to as the premier murder lawyer of this century. He continues to practice law six days a week in his Houston office.

JOHN S. FRANCE received a B.S. in Speech from Ball State University in 1974 and a J.D. from the University of Toledo College of Law in 1978. He served as symposium editor for the UNIVERSITY OF TOLEDO LAW REVIEW and was formerly counsel for Owens-Illinois, Inc. France is currently a partner in the law firm of Shinkle, Shinkle and France.

JANE GOODMAN graduated from the University of Puget Sound School of Law in May, 1983, and is a Doctoral Candidate in Educational Psychology at the University of Washington.

KENNEY HEGLAND teaches law at the University of Arizona. He has also taught at U.C.L.A. and Harvard. He is the author of TRIAL AND PRACTICE SKILLS IN A NUTSHELL (West, 1978) and has recently completed a new Nutshell for West, INTRODUCTION TO THE STUDY AND PRACTICE OF LAW (1983).

DAVID B. HINGSTMAN received his B.A. from Princeton University in 1975 and his J.D. from Harvard Law School in 1978. From 1978 through 1980, he was an associate attorney with the law firm of Simpson, Thacher, and Bartlett, New York City. He is currently a doctoral candidate in the Department of Communication Studies at Northwestern University. In 1983-84, he will be a lecturer in Communication Studies at Baylor University.

NORBERT S. JACKER (A.B., 1949; LL.B., 1952, Harvard University) teaches Negotiations, Legal Ethics and other subjects at DePaul University College of Law, Chicago, Illinois. Prior to joining the DePaul faculty on a full-time basis in 1979, Professor Jacker was a partner in the Chicago, Illinois law firm of Kirkland and Ellis, where he practiced for 27 years. He has presented seminars on negotiations throughout the United States and Canada, using materials and techniques he has developed. Professor Jacker's book, EFFECTIVE NEGOTIATION TECHNIQUES, is scheduled for publication by the National Institute for Trial Advocacy in mid-1983.

ELIZABETH F. LOFTUS is a Professor of Psychology at the University of Washington. She completed her Ph.D. in Psychology at Stanford University in 1970, and is the author of ten books, including EYEWITNESS TESTIMONY (Harvard University Press, 1979) and MEMORY (Addison-Wesley, 1980).

NANCY GOSSAGE MCDERMID is Dean of the School of Humanities at San Francisco State University. She has also served as Professor and Chairperson of the Department of Speech Communication at the same institution. McDermid has a B.S. and M.S. in Speech from Northwestern University and a J.D. (Order of Coif) from the University of Chicago Law School. She has been President of the Western Speech Communication Association and active in the American Civil Liberties Union. Her research and teaching areas are academic freedom, the First Amendment, due process, rhetoric in the courts, women and the law, and argumentation.

RUTH M. MCGAFFEY (B.A., St. Olaf College, 1953; M.A., University of Nebraska, 1955; Ph.D. Northwestern University, 1970) has taught at Boston College, Concordia College and the University of Wisconsin-Milwaukee. She teaches Argumentation and Debate, Freedom of Speech, Public Speaking, Language of Effective Communication and Communication and the Law. McGaffey publishes on First Amendment topics and has served as editor of the FREE SPEECH NEWSLETTER.

FRANCIS E. MCGOVERN is Professor of Law at Boston University. After serving as an attorney with Vinson and Elkins in Houston, he taught law at Cumberland and the University of Alabama Schools of Law. He holds a B.A. from Yale University and a J.D. from the University of Virginia. He has published three books and several articles on product liability, toxic substances litigation and expert witnesses, as well as the Matthew Bender textbook, SUCCESSFUL LITIGATION TECHNIQUES, which he wrote in 1981 with Joseph Kelner.

RONALD J. MATLON (Ph.D., Purdue University) is on the faculty at the University of Arizona in Tucson. His areas of expertise are communication in the legal process, argumentation, forensics, and historical-critical, and descriptive research methodologies in speech communication. He is the author of the soon to be published book by Holt, Rinehart and Winston, COMMUNICATION IN THE LEGAL PROCESS. He has also published three editions of INDEX TO SCHOLARLY JOURNALS IN COMMUNICATION STUDIES for the Speech Communication Association. In addition, Matlon has given over fifty speeches or professional papers at academic and legal conferences and has published nearly twenty articles. Matlon is President of the Association of Trial Behavior Consultants and has offered his consulting services to bar associations and law firms in the areas of jury selection, witness preparation and examination, opening statements, and summations.

GERALD R. MILLER holds a Ph.D. in communication from the University of Iowa. He is now a Distinguished Professor of Communication at Michigan State University. Prior to joining the faculty there in 1963, he was a member of the faculties of the University of Iowa and the University of Washington. His major research and teaching areas include communication theory, interpersonal communication, persuasion, and communication in legal settings. He has authored or edited nine books and has written many book chapters and journal articles in communication, psychology, and law. He was the first editor of the journal, HUMAN COMMUNICATION RESEARCH and is the present editor of COMMUNICATION MONOGRAPHS. He is a past President of the International Communication Association. Miller is a four-time recipient of the Speech Communication Association's Golden Anniversary Prize Fund Award for Outstanding Scholarship, the most recent of these Awards being in 1980 for the book, VIDEOTAPE ON TRIAL: A VIEW FROM THE JURY BOX, coauthored with Dr. Norman E. Fontes.

CARL M. MOORE is an Associate Professor of Speech Communication at Kent State University. He is the recent author of two books on negotiation and mediation strategy published by the Kettering Foundation.

ROBERT E. NOFSINGER received his Ph.D. in speech communication from the University of Iowa in 1973. He teaches interpersonal and small group communication and language behavior in the Department of Communication at Washington State University, where he recently devoted a research leave to the study of communication control tactics in the courtroom. He is the author of the Sage publication, "Tactical Coherence in Courtroom Conversation," in CONVERSATIONAL COHERENCE: STUDIES OF FORM AND STRATEGY, ed. Robert T. Craig and Karen Tracy.

SEAN PATRICK O'ROURKE is pursuing concurrent degrees at the University of Oregon: a Ph.D. in rhetorical communication and a J.D. in law. O'Rourke has previously taught at Humboldt State University. His major areas of research are legal negotiation and conflict management and resolution.

DON PETERS is Professor of Law and Director of the Civil Clinic at the University of Florida College of law in Gainesville. He graduated from the University of Iowa College of Law in 1968 and then clerked for the United States District Court in Colorado. He has taught at the University of Colorado School of Law and the University of Malaya in Kuala Lumpur, Malaysia where he helped begin Southeast Asia's first clinical legal education program focused on lawyering skills instruction. His teaching interests include Civil Procedure courses that emphasize instruction in interviewing, counseling, negotiating and trial advocacy skills.

JANICE SCHUETZ is Associate Professor of Speech Communciation at the University of New Mexico, Albuquerque. Her research interests include argumentation theory and criticism and First Amendment issues. She teaches a pre-law sequence of courses in her department and assists the moot court program at the University of New Mexico Law School.

RITA JAMES SIMON (Ph.D., University of Chicago, 1957) is Dean of the School of Justice at The American University. She has been a Professor of Sociology at the University of Illinois, Hebrew University in Jerusalem, and the University of Chicago. Simon has served as editor of the AMERICAN SOCIOLOGICAL REVIEW and has written nearly one hundred articles on juries, ciminology, and social relations. Among her fourteen books and monographs are THE JURY AND THE DEFENSE OF INSANITY (Little, Brown), THE JURY SYSTEM (Sage), and THE AMERICAN JURY (Lexington).

DAVID H. SMITH is a Professor of Communication in the Department of Comprehensive Medicine at the University of South Florida in Tampa. His scholarship and teaching has been in conflict resolution, communication administration and communication processes.

JANET SPARROW is a Ph.D. candidate in Speech Communication and Graduate Teaching Fellow at the University of Denver.

V. HALE STARR, Ph.D., is president of the consulting firm, Starr & Associates, Inc., Des Moines, Iowa. She holds an M.Ed., from Black Hills State College, and a M.A. and Ph.D. from the University of Iowa. Starr works primarily in the area of forensic communication, with a focus on analysis of jurors, their reactions to legal issues and profiling of desirable/undesirable jurors.

K. PHILLIP TAYLOR is a Professor of Communication at the University of Central Florida, Orlando. He has a Ph.D. from Indiana University. Taylor's areas of emphasis are human communication theory, interpersonal and small group processes and legal communication. He has authored publications in all of these areas and is currently writing COMMUNICATION AND COURTROOM ADVOCACY for Scott, Foresman. Taylor is Chairman of the SCA Commission on Communication and Law.

LEROY J. TORNQUIST (B.S. and J.D., Northwestern University) is Dean and Professor of Law at Willamette University in Salem, Oregon. He earlier taught at the McGeorge and Loyola-Chicago Schools of Law. Prior to teaching, Tornquist was a practicing attorney in Chicago. He has published numerous articles on evidence and trial advocacy. Tornquist is past president of the Court Practice Institute.

CHERYN HEINEN WALL (B.A., Butler University and M.A., University of Michigan) is a Ph.D. student at Kent State University. Her special area of interest is negotiation and mediation. She has taught at Loyola University of Chicago, Cuyahoga Communication College (Ohio), and John Carroll University.

JAMES F. WEAVER is an Associate Professor of Speech Communication at Iowa State University. He is past President of the American Forensic Association and current Secretary of Delta Sigma Rho--Tau Kappa Alpha and Executive Secretary of the Central States Speech Association. He has presented papers on legal communication at the Speech Communication Association and Western Speech Communication Association Conventions. Weaver received his Ph.D. from Michigan State University in 1969.

JOHN W. WRIGHT II is an Associate Professor of Journalism and Communication at the University of Florida. He received a Ph.D. from Ohio State University in 1976. Wright is a specialist in communication and mass communication theory and mass media law. He has published research dealing with trial advocacy witness credibility and factors affecting juror decision-making, and has researched regulatory policies affecting the electronic media for the U.S. Senate.

GORDON I. ZIMMERMAN received his Ph.D. from the University of Minnesota. He is an Associate Professor of Speech Communication at the University of Nevada, Reno. He is on the faculty of the National Judicial College in Reno and the National Institute for Trial Advocacy. He conducts communication training and faculty development for the California Judicial College, the National College of Juvenile Justice, the Association of Trial Lawyers of America, and for several bar and judicial associations. Zimmerman has authored three textbooks in communication (West Publishing).